89-348

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Petitioners,

v.

JOHN F. ROSCH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to correct a finding of fraudulent misrepresentation where Petitioners were unconstitutionally deprived of due process in violation of the Fourteenth Amendment, in that Petitioners were prevented from asserting at trial that Respondent entered his transaction with Petitioners as part of a larger scheme to commit a variety of criminal acts, now the subject of a federal indictment, and Petitioners were further prevented from introducing material evidence showing that Petitioners' statements to Respondent were immaterial to and were not relied on in any way by Respondent.

* * *

2. Whether certiorari should be granted to correct a fraud damage award where Petitioners were denied property without due process in violation of the Fourteenth Amendment, in that Petitioners were barred from introducing material evidence that Respondent suffered no injury whatsoever, in that Respondent never paid liabilities he claimed were fraudulently concealed from him and indeed sold his interest in the subject property at a profit before many of the liabilities on which he was awarded damages were paid.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Jack L. Hargrove Builders, Inc., a corporation, and Jack L. Hargrove, an individual; the Respondent, John F. Rosch, an individual; and Gerill Corporation, a corporation, and Gerald A. Heinz, an individual.

A separate statement is being filed with the Clerk of this Court, pursuant to United States Supreme Court Rule 19.6, that, in Petitioners' belief, Gerill Corporation and Gerald A. Heinz have no interest in the outcome of this Petition.

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Petitioners Jack L. Hargrove Builders, Inc. and Jack L. Hargrove, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court for the State of Illinois entered in the above-entitled proceeding on March 29, 1989, and the denial of a Petition For Rehearing entered on May 26, 1989.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 128 Ill.2d 179, 538 N.E.2d 530 (1989) and is reprinted in the Appendix hereto at page A1, *infra.*

The order of the Illinois Supreme Court denying Petitioners' Petition for Rehearing, dated May 26, 1989, is reprinted in the Appendix hereto at page B1, *infra.*

The order of the Appellate Court for the Second District of Illinois and the judgment order and letter of opinion of the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois are unreported and are reprinted in the Appendix hereto at pages C1 and D1, *infra*, respectively.

JURISDICTION

The opinion of the Illinois Supreme Court affirming the Appellate Court's fraud judgment against Petitioners was rendered on March 29, 1989, with rehearing denied on May 26, 1989. This petition is filed within 90 days of the issuance of the Illinois Supreme Court's denial of the petition for rehearing.

Petitioners invoke the jurisdiction of this Court to review the judgment and order of the Illinois Supreme Court under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

With this Petition Jack L. Hargrove Builders, Inc. and Jack L. Hargrove (collectively "Hargrove") ask this Court to review and reverse a finding of fraud against them arising from the sale of their interest in 110 acres of real estate in Woodridge, Illinois ("Woodridge" or the "Woodridge Properties") to a man named John F. Rosch ("Rosch"). Petitioners assert that the systematic exclusion of critical material evidence in this case prevented Hargrove from demonstrating Rosch's true motive for purchasing Hargrove's interest in Woodridge—i.e. that Rosch intended to illegally and surreptitiously obtain money in the name of others from a savings and loan which he controlled. Evidentiary rulings, made at trial and affirmed on appeal, excluded direct evidence of Rosch's fraud in dealing with his own savings and loan. These rulings violated the due process clause of the Fourteenth Amendment, in that they prevented Hargrove from (1) presenting his theory of defense to a claim of fraud brought by Rosch, (2) presenting evidence demonstrating that Rosch suffered no damage from the "fraud" he alleged, and (3) demonstrating to the court that Rosch's fraud judgment was the result of perjured testimony on matters critical to this case.

This case revolves around purportedly "fraudulent" statements made by Hargrove to Rosch at the time they signed their agreement, dated March 1, 1981. Rosch claims that inaccurate statements made by Hargrove regarding a handwritten list of invoices, first given to Rosch two months before the parties' transaction, induced Rosch to deal with Hargrove. Hargrove contends that the representations and list Rosch claims he "relied" on were, indeed,

utterly irrelevant and immaterial to Rosch who, in fact, had other motivations all his own. The courts' exclusion of material evidence, however, prevented Hargrove from showing Rosch's real motivation. The courts' exclusion of material evidence prevented Hargrove from showing Rosch's lack of reliance on, and the immateriality of, the list, and prevented Hargrove from demonstrating, irrefutably, that Rosch procured his fraud judgment by giving perjured testimony at trial.

From the moment Rosch's complaint was filed in the Illinois circuit court, Hargrove tried to establish the inherent nature of Rosch's deal with Hargrove, and tried to expose Rosch's motive for acquiring Hargrove's interest in Woodridge. Rosch's motive, specifically, was to obtain access to hundreds of thousands of dollars for personal investment activity from the very savings and loan he served as president, Glen Ellyn Savings and Loan Association ("Glen Ellyn"), and whose loans to Woodridge Rosch personally approved. Hargrove attempted to demonstrate that Rosch illegally used his position in Woodridge to obtain ready cash for himself when high interest rates made such cash otherwise unavailable. Hargrove tried to show that Rosch actively engaged in a scheme to manipulate Glen Ellyn for personal ends, and that, in fact, the representations of Hargrove and the list of invoices were utterly immaterial to Rosch's plan. In support of his theory, Hargrove attempted to introduce evidence that money which was intended to be used in Woodridge was taken out by Rosch, in Hargrove's name, for personal use instead; that Rosch concealed his interest from the Board of Directors of Glen Ellyn; and that Rosch filed false affidavits with federal authorities, to further conceal his Woodridge interest.

No court ever gave a reasoned evaluation or allowed direct and probative evidence to reveal Rosch's non-reliance on Hargrove and his true motives for his transaction. The circuit court, under a confused notion of relevancy, prevented the submission of Hargrove's evidence. The Illinois Appellate Court and the Illinois Supreme Court affirmed this decision, giving undue deference to the talisman of "manifest weight of the evidence." But, because substantially all of Hargrove's material and probative evidence was excluded, Hargrove was denied a fair hearing under the manifest weight of the evidence and under the U.S. Constitution. With Hargrove's evidence included, the manifest weight overwhelmingly favored Hargrove.

On July 13, 1989, a federal grand jury issued a 31-count criminal indictment of John Rosch and others, on (among other things) the very matters Hargrove was prevented from introducing into evidence in this case. The indictment corroborates Hargrove's contention that Rosch arranged his transaction with Hargrove in order to defraud his own savings and loan. The indictment provides clarity and support for this theory of defense and demonstrates the unconstitutionality of the rulings made against Hargrove at trial and on appeal.

The refusal to set aside the circuit court rulings by the Illinois Appellate and Supreme Courts deprived Hargrove of his property without due process of law and is a miscarriage of justice. If the Illinois courts' rulings are allowed to stand, Hargrove will be denied property without due process through the award of compensation to Rosch without any showing of actual loss, and without Hargrove having had his constitutionally guaranteed right to present his defense. Hargrove demonstrates below why a writ of certiorari should be granted to correct this injustice.

Factual Background

The parties' dispute concerned Hargrove Builders' transfer of its interest in certain real estate to Rosch under an agreement dated March 1, 1981, and the rights and liabilities related to that transfer. From approximately 1976 through February 28, 1981, Hargrove Builders was a 50% joint venturer with the Gerill Corporation ("Gerill") in the development of approximately 110 acres of real estate located in Woodridge, Illinois ("Woodridge" or the "Woodridge Properties"). C-7597; 7650-52; 8533. Hargrove and Gerill subdivided Woodridge beginning in 1976, and assigned new names (e.g. Oak Hills; Piers I and II) to each parcel. C-7736-37. Work was funded for separate parcels on an ongoing basis through construction loans. At all relevant times, Hargrove was the president of Hargrove Builders and Gerald A. Heinz ("Heinz") was the president of Gerill.[1]

As early as 1978, a primary mortgage lender for Woodridge was Glen Ellyn Savings & Loan Association ("Glen Ellyn"), whose president was John Rosch. As of January, 1981, Glen Ellyn had outstanding loans for one parcel of Woodridge, known as Piers II, totaling $3 million. Pl. Ex. 3-2. In the latter part of 1980, Hargrove Builders applied for construction loans for another portion of Woodridge, Oak Hills. In early 1981, Glen Ellyn issued six construction loan commitments for Oak Hills in the amount of $140,000 each, or $840,000, to Hargrove Builders. C-8157-58; 8161. John Rosch was personally and directly involved in approving these commitments. C-8137.

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[1] The Illinois courts' judgment as to Heinz and Gerill, third party defendants and co-plaintiffs with Rosch in the original action, is not a subject of Hargrove's Petition to this Court.

On March 1, 1981, at Heinz's suggestion, Rosch purchased Hargrove's interest in Woodridge for $200,000 and the assumption of liabilities. C-7608-09; 7817; 7826. Heinz approached Rosch, and was the only one who talked to Rosch about purchasing Hargrove's interest before March 1. C-8569-71. Hargrove and Heinz testified that Heinz wanted Rosch to purchase Hargrove's interest because he wanted access to the resources of an S&L. C-8614-15. According to Heinz, "John [Rosch] . . . lent some financial strength to the deal which Jack [Hargrove] was professing wasn't there at the time." C-7608.

The transaction took place at a time of extraordinary stress in the building market: for example, between 1980 and mid-1981, interest rates rose from 12½% to 21½%. C-7825; 8153. The predominant form of residential sale in the area was the land contract, or "article of agreement" sale, whereby new buyers made minimal down payments and low monthly payments, with a "balloon" payment made at some future date. C-8152. Land contracts for Woodridge as of March 24, 1981 were valued in excess of $6 million. C-8083; 8085-86; 8091-92.

The parties' dispute focuses on one issue, purely and simply: what motivated Rosch to purchase Hargrove's interest in Woodridge on March 1, 1981. Rosch contends he was induced by Hargrove's alleged omissions of incurred liabilities in a handwritten "list" of invoices. Hargrove claims that the handwritten "list" was irrelevant to Rosch's motivations, and that Rosch's decision to purchase Hargrove's Woodridge interest was Rosch's first step in a scheme to defraud Glen Ellyn. Hargrove's Petition is before this Court because the Illinois courts systematically and unconstitutionally prevented Hargrove from presenting evidence in support of this defense, and indeed rendered a judgment in Rosch's favor which was

based upon perjured testimony Hargrove was denied the chance to rebut.

The Parties At The Time Of The Signing Of The March 1, 1981 Agreement

At the time of the March 1, 1981 agreement, Rosch was a lawyer; accountant; licensed real estate broker; president, shareholder and member of the Board of Directors of Glen Ellyn Savings & Loan; and a member and shareholder in Attorney's Title Guaranty Fund. Moreover, at trial Rosch testified on his own behalf as an accounting expert. Rosch admitted that at Glen Ellyn, he held "ultimate responsibility" for all Glen Ellyn real estate transactions. C-8137. As of March 1, 1981, Rosch had also been involved in real estate as an attorney, broker, lender, developer, investor and title insurer. He had been involved in more than 250 real estate deals, C-7823-24, 8130-54, 9990-10000, and in fact served as Heinz's lawyer in real estate matters as recently as December, 1980. C-7702. Hargrove was a real estate developer who completed an eighth grade education and received a GED high school degree. C-8529-32. Hargrove entered into the March 1, 1981 agreement without a lawyer. C-8357.

Rosch's Actions Before March 1, 1981

Rosch testified that he made an economic decision to purchase Hargrove Builders' interest and that he took the risk knowing the market conditions. C-7878; 8122-23. Evidence showed that Rosch visited Woodridge before the transaction, observed the development in various phases of construction and prepared his own computer spread sheet on the value of the property, later destroyed. C-8430-31; 7826-27. Hargrove gave Rosch the chance to review purchase orders and contractor's statements before

March 1, the latter of which would have informed Rosch of all remaining expenses for Woodridge. C-8315; 8338-39. By his own admission, Rosch did not review these documents. C-8315.

Rosch based his claim of fraudulent misrepresentation on alleged omissions of loans and invoices from a 17-page handwritten list, prepared by Hargrove at Heinz's request two months before the transaction with Rosch. Har. Ex. 32; C-8569-72. The list was prepared to inform Heinz of outstanding expenses on Woodridge as of January, 1981, C-9599, and was reviewed by Rosch himself in January, 1981, over a month before his transaction with Hargrove. C-7608-10; 7817.

Hargrove's Theory of Defense

Hargrove maintained throughout trial that there was no fraud; that Rosch was not induced in any way by Hargrove to deal with Hargrove Builders, but in fact had personal motives all his own for the transaction, i.e., to unlawfully fund personal investment activity by illegally obtaining loans from his own savings and loan, Glen Ellyn, in the name of others.[2] Even assuming, *arguendo*, that Hargrove made fraudulent misrepresentations to Rosch, Hargrove further argued that Rosch presented no evidence demonstrating that any damage resulted from his transaction with Hargrove. Indeed, Hargrove maintained that "damages" claimed by Rosch related to liabilities which were either unpaid or were paid by others.

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[2] Hargrove was denied the admission of evidence showing that Glen Ellyn Savings and Loan was placed into receivership by federal authorities in September, 1985, as a result of Rosch's scheme. Har. Ex. 213, 220 (refused).

For example, Rosch contended that Hargrove failed to advise him of construction costs for two contractors at Oak Hills. Admitted evidence showed that in January, 1981, in his capacity as president of Glen Ellyn, Rosch authorized Glen Ellyn to approve construction loans which were intended to go towards the payment of these very contractors. C-8137; 8157-58; 8161-62; 8666-67; Har. Ex. 115. However, the trial court excluded Hargrove's introduction of contractors' statements showing that Rosch actually used Hargrove's name to obtain the construction loan proceeds for himself and, indeed, that Rosch did not pay the two contractors whose invoices he claimed Hargrove misrepresented. C-7753; 9368-77; 8739-40. Despite Rosch's having pocketed construction loan proceeds for these contractors, Rosch was awarded approximately 50% of his judgment based on these contractors' "omitted" invoices. Appendix D-1, *infra*.

One cannot envision a more sophisticated purchaser of property with which he was already intimately familiar than John Rosch. Rosch claimed to have been misled on March 1 by statements about a handwritten list he personally reviewed in January. Yet, rather than being misled, immediately after closing Rosch funneled money from his savings and loan into his pocket or the pockets of his partnership.

Hargrove tried repeatedly to demonstrate that John Rosch's transaction with Jack Hargrove was part of a sophisticated scheme to use others to obtain money from his savings and loan to fund personal investment activity. Rosch has now been indicted on this very matter. Hargrove was prepared to demonstrate that to further his scheme, Rosch concealed his interest in Woodridge from the Glen Ellyn Board of Directors, and later sub-

mitted false affidavits to the Federal Home Loan Bank Board regarding his Woodridge ownership. At every step, Hargrove was denied the right to present this case.

Evidentiary Rulings

During the course of trial, and over the objection of Hargrove's counsel, the trial court ruled that any evidence relating to events occurring after March 1, 1981 was immaterial to the issue of fraud, and excluded such evidence. C-9325-27; 9331-32. Hargrove's counsel objected that evidence of events before and after March 1 was essential both to determine damages and to demonstrate Rosch's true motivations, his lack of reliance on Hargrove, and his complete lack of credibility, essential to any showing of fraud. The trial court repeatedly excluded Hargrove's proffered evidence dated after March 1. For example:

1. Rosch testified that after he acquired Hargrove's interest in the Woodridge Properties, he advised the Glen Ellyn Board of Directors of his interest in Woodridge and abstained from voting on these matters. C-8158; 9428-29. In fact, the May 12, 1981 Glen Ellyn Board minutes show that Rosch not only concealed his interest in the Woodridge properties, but actually voted with the Board in approving Woodridge loans. Har. Ex. 299 (refused). As Hargrove informed the trial court, Rosch's concealment of his interest in Woodridge from Glen Ellyn's Board, in order to influence the Board's issuance of loans to Woodridge, constituted a direct violation of federal law, 18 U.S.C. §1014.[3] Nonetheless, the trial court refused to allow

[3] "Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . the Federal Home Loan Bank Board . . . , any institution the accounts

(Footnote continued on following page)

Hargrove to cross examine or present documentary evidence to refute Rosch's perjured testimony on this point. C-9428-35. Rosch has now been indicted on this matter.

2. Hargrove attempted to introduce evidence that in September, 1984, Rosch also concealed his interest in Woodridge from Federal Home Loan Bank Board ("FHLBB") authorities, when he purchased the interest of other shareholders of Glen Ellyn and acquired control over the association. C-9439-41; Har. Ex. 212 (refused). Specifically, Rosch filed a false affidavit with the FHLBB, indicating that he had never had any "loans, contracts or transactions of any kind" with Glen Ellyn. Again, Rosch's false statement was in direct violation of 18 U.S.C. §1014. Rosch's false affidavit went directly to the issues of Rosch's credibility, his true motives and the immateriality of Hargrove's representations. To the trial court, however, the evidence was merely collateral, and was denied. C-9440.

3. Proffered evidence dated after March 1, 1981 showed that Rosch falsely submitted contractor's statements to Glen Ellyn Savings to obtain money for himself, rather than to pay contractors. Such evidence went directly to both the question of Rosch's motives for transacting with Hargrove and his "damages" after having done so. Because it was dated after March 1, the court treated these as "collateral" matters, and excluded the evidence over Hargrove's objections. Har. Ex. 121; 122; 124; 126; 127;

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[3] *continued*

of which are insured by the Federal Savings and Loan Insurance Corporation . . . , any member of the Federal Home Loan Bank System, [or] the Federal Savings and Loan Insurance Corporation . . . upon any application . . . purchase . . . , or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both." 18 U.S.C. §1014 (1989).

131; 134 through 141 (refused); C-9326; 9359-76. Rosch has now been indicted on this matter.

4. The construction loans for Oak Hills, applied for by Hargrove in late 1980 and intended to be used to pay invoices from two contractors on Oak Hills, in fact were funded by Glen Ellyn and used by Rosch personally after Rosch acquired Hargrove's interest on March 1, 1981, according to sworn contractors' statements. Har. Ex. 127 (refused). The contractors' invoices were never paid, yet evidence on this point was denied on grounds that it was dated after March 1 and was collateral to Rosch's case for fraud. C-7753; 9368-77; 8739-40. Had it been allowed, the evidence would have shown that Rosch pocketed funds which were specifically designated to pay contractors' invoices. Because it was not allowed, Rosch was awarded damages on these allegedly omitted invoices instead.

5. After March 1, 1981, an employee for Rosch and Gerill, Daniel Gilmartin, signed lien waivers and received checks from Glen Ellyn for contractor fees, purportedly as agent for Hargrove Builders. Excluded evidence showed that the money went to Rosch and Gerill, not to Hargrove. *See* Har. Ex. 122; 123; 126; 127; 131; 149; 271 (refused); C-7735-36; 7745; 7748; 8216-17; 8230; 8240-41. The trial court refused to admit exhibits showing that Gilmartin submitted false documents to Glen Ellyn to draw money out in Hargrove's name. C-9361-62.

6. Months after acquiring Hargrove's interest in Woodridge, Rosch began to sell portions of his interest for substantial profit. Rosch transferred part of his ownership interest in Woodridge to Gerill in July, 1981, Har. Ex. 225 (refused), and sold Gerill his interest in another portion of Woodridge for $500,000 in March, 1982. Har. Ex. 232 (refused). That same March, Gerill, acting as

Rosch's intermediary, transferred Rosch's interest in some of his Woodridge land contracts to Glen Ellyn, Rosch's own company. Har. Ex. 233 (refused). One of Rosch's partnerships received over $544,000 for the sale. *Id.*

Evidence regarding Rosch's quick sale of his Woodridge interest went directly to the question of Rosch's failure to pay liabilities for which he claimed, and won, damages. The evidence also related directly to a demonstration of Rosch's true motivation for his transactior. with Hargrove. But, because the documents showing Rosch's sale of his interest were subsequent to March 1, the court not only denied their admission, C-9321-22, but also excluded Hargrove's entire line of questioning on the subject. C-8392-93. Rosch has now been indicted on this matter.

Procedural History

Following a bench trial, on February 13, 1987, the Circuit Court of Illinois for the 18th Judicial Circuit entered judgment in favor of Rosch and against Hargrove and awarded damages in the amount of $148,799.69, plus costs. *See* D1, *infra.*

The trial court's judgment as to fraud was affirmed by the Appellate Court of Illinois for the Second District on March 7, 1988, 165 Ill. App. 3d 1160 (unpublished order under Illinois Supreme Court Rule 23). *See* C1, *infra.* The Illinois Supreme Court affirmed the fraud judgment against Hargrove on March 29, 1989, *see Gerill Corporation v. J.L. Hargrove Builders*, 128 Ill. 2d 179, 538 N.E.2d 530 (1989), and denied Hargrove's petition for rehearing on May 26, 1989. *See* A1 and B1, respectively, *infra.*

At the Illinois Circuit Court, Appellate Court and Supreme Court levels, counsel for Hargrove argued that evidence relating to the issues of "theory of defense" and

damages was fundamental to the determination of this case, and that the exclusion of Hargrove's evidence on these matters effectively prevented Hargrove from defending the action against him. *See, e.g.*, C-7740-41 (September 30, 1986); C-8179-85 (October 2, 1986); C-8258-61 (October 6, 1986). After the Illinois Supreme Court ruled that Hargrove's proof that Rosch suffered no actual loss was "irrelevant", Hargrove asserted in his petition for rehearing that the lower courts' and Supreme Court's exclusion of such material evidence constituted unconstitutional deprivations of due process, in violation of the Fourteenth Amendment to the U.S. Constitution.

Indictment of Rosch

On July 13, 1989, a special federal grand jury brought a 31-count indictment against John Rosch charging him and others with racketeering, including mail fraud and wire fraud, and with violations of federal banking regulations relating to Glen Ellyn Savings. *See United States of America v. John Franklin Rosch, et al.*, No. 89 CR 592, in the United States District Court for the Northern District of Illinois; App. E1, *infra*.

The indictment charges Rosch with numerous acts of illegally obtaining Glen Ellyn funds for personal gain, and with falsifying and concealing documents from Glen Ellyn's Board of Directors. Count 29 of the indictment specifically relates to the Oak Hills development in Woodridge, and to evidence excluded in this trial. Count 29 charges Rosch with obtaining $840,000 in loans from Glen Ellyn for Woodridge in May, 1981, while Rosch was president of Glen Ellyn, even as he concealed his interest in Woodridge from the Glen Ellyn Board. App. E1, Count 29, ¶6. The indictment charges Rosch with obtaining loans for Woodridge in the name of Hargrove Builders, to conceal his

interest in Woodridge, *id.*; with causing Glen Ellyn Savings to purchase land contracts for Woodridge in March, 1982, while continuing to conceal the fact that he held a 50% interest in these contracts, *id.* at Count 29, ¶7; and with scheming to borrow an additional $3 million from Glen Ellyn for Woodridge between July, 1982 and March, 1985—again while concealing his interest in Woodridge from the Board. *Id.* at Count 29, ¶¶17-20.

The federal grand jury charges on Woodridge related directly to evidence Hargrove attempted to introduce—evidence which the trial court, Appellate Court and Supreme Court of Illinois all found was immaterial. Hargrove maintains that these rulings deprived him of his constitutional right to due process and require certiorari review by this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS COURTS' EVIDENTIARY RULINGS BARRED PETITIONERS FROM INTRODUCING MATERIAL EVIDENCE IN SUPPORT OF THEIR THEORY OF THE CASE, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This Court should grant certiorari in this case for one simple reason: erroneous evidentiary rulings by the Illinois courts worked to deprive Hargrove of his constitutional right to due process, both as to Hargrove's theory of defense and as to Hargrove's showing of "no damages." These rulings now threaten to reward John Rosch with a windfall profit of over $148,000, following a multi-million dollar swindle for which he has already been indicted.

Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J.) (concurring opinion). At a minimum, due process requires that a deprivation of life, liberty or property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). (emphasis added). "Persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"—at a meaningful time *and* in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Moreover, due process requires that a party be given the opportunity to present "every available defense" on his own behalf. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

The opportunity to be heard in a meaningful manner "on every available defense" was not given to Jack Hargrove in the trial of this action. From day one, Hargrove was systematically denied the chance to show Rosch's true motives for his transaction with Hargrove, and denied the chance to show not only Rosch's lack of reliance on the handwritten list but the utter immateriality of that list.

For example, on October 2, 1986—the first day he was cross-examined by counsel for Hargrove—Rosch was cross-examined regarding his self-dealing with Glen Ellyn Savings, and particularly his use of Hargrove's name after March 1 to obtain loans for Woodridge from Glen Ellyn. All of Hargrove's counsel's questioning of Rosch on this point went towards one end: to demonstrate that Rosch's purchase of Woodridge fit into his larger scheme of using the savings and loan to fund personal investment activity

and had nothing to do with the list or with Rosch's discussions with Hargrove on March 1.

Each of Rosch's counsel's objections was sustained by the trial court; all evidence by Hargrove regarding Rosch's personal dealings after March 1 was denied. Hargrove's counsel argued that proof of his theory of defense depended on the presentation of evidence regarding Rosch's conduct both before and after March 1. Inexplicably, the trial court ruled that the only question relevant to the consideration of fraud and damages was whether an invoice was "on or off the list" as of March 1. The court ignored and excluded ample evidence and barred testimony concerning post-March 1 events relating directly to Rosch's motive, his damages and his credibility, finding that "[i]n view of the time reference, I don't perceive the relevance." C-8179.

The trial court's systematic rejection of evidence on Hargrove's theory of the case was well illustrated by the following passage.

> MR. KING: This is a more broad—this witness has testified to his loss, his alleged loss in this transaction. He has asked you to segment the transaction and look at one part of it. I say that the Court has to look at the whole transaction, including the motive of the witness to go into the transaction; and if, in fact—well, I hate to argue this, frankly, in front of the witness on the stand.
>
> THE COURT: I am going to sustain the objection. I don't—I think it is up to you to show me the relevancy of the question, and I really don't perceive it. Please proceed.
>
> * * *
>
> MR. KING [in sidebar]: Your Honor, we have asserted that part of the reason that Mr. Rosch went into this transaction—not only is he a sophisticated

real estate investor, which he clearly is at this point, but also because he had other motives in terms of covering his investment.

It is obvious that what we have here was a distressed market, and we had a real estate development that, because of economic circumstances, generally was having problems. Why does a man go into that kind of deal—particularly when he is a lawyer and a sophisticated investor?

* * *

MR. KING: How can I explain the relevance to you if you won't let me explain?

THE COURT: It's hard.

MR. KING: Honestly, Judge—

MR. MCGARRY: You can't explain it because it is not relevant, Counsel. That is the problem.

THE COURT: The thing is, what does his motive have to do with the issue in this case, whether or not he is correct or mistaken that he is entitled to recover for alleged non-disclosures? What does it have to do with it?

* * *

MR. KING: With all due—the issue isn't only on or off that list. That list might be considered by the Court for whatever the Court wants to consider it, but that's not this whole case, notwithstanding the efforts of plaintiff to portray it that way. That is not the case.

You are talking about an allegation of a fraudulent inducement into a sophisticated real estate transaction. Now, we have already seen the $200,000 cash. He bought at least $6,000,000 worth of properties plus other interests—

MR. MCGARRY: I object to that, Judge.

MR. KING: You know he didn't buy that for $200,000 alone. You have to look at the whole transaction. You can't separate it out.

> THE COURT: Well, you know, right now, I just don't perceive the relevancy of it. I am going to sustain the objection.

C-8180-85.

The court in this exchange clearly demonstrated its refusal to consider competent evidence which absolutely rebutted Rosch's claim of fraud.

The trial court's exclusion of evidence bearing on Hargrove's case theory continued on the next trial date, October 6. On that occasion, the Court granted a motion *in limine* by Rosch, preventing Hargrove from introducing evidence relating to any other litigation against Rosch, including, specifically, actions against Rosch by the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). Some 29 separate exhibits were denied as a result of the court's ruling, all of which underscored Rosch's repeated lying under oath on matters related to this transaction, his manipulation of Glen Ellyn assets for personal gain and his complete lack of credibility as to his claim of fraud.[4] C-8259; 8269-71.

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[4] Among these, Har. Ex. 206 (refused), a memorandum opinion in the matter of *FSLIC v. Glen Ellyn Savings & Loan Association*, No. 84 C 7685 (N.D. Ill. Nov. 13, 1984), ordering Glen Ellyn to comply with an FSLIC Cease and Desist Order in connection with numerous "lending practices and conflict of interest situations" in violation of FSLIC and Illinois regulations; Har. Ex. 211 (refused), a memorandum opinion in the matter of *FSLIC v. John F. Rosch*, No. 84 C 7682 (N.D. Ill. March 27, 1983), finding that Rosch acquired control of Glen Ellyn Savings without notifying the FSLIC, in violation of the Change in Savings and Loan Control Act of 1978, 12 U.S.C. §1730(q)(1982); and Har. Ex. 212 (refused), a sworn affidavit by Rosch dated September, 1984 in which Rosch states that he had no "loans, contracts or other transactions of any kind" with Glen Ellyn Savings & Loan. At trial, Rosch acknowledged that he indeed obtained loans for the Oak Hills portion of Woodridge for himself prior to 1984. C-8157-58; 9428-29.

Each subsequent attempt by Hargrove's counsel to introduce evidence on Rosch's motive for his transaction with Hargrove was also rejected. On October 7, Hargrove's counsel tried to introduce evidence demonstrating that Rosch made false statements under oath regarding his disclosure of his interest in Woodridge to the FHLBB and the Glen Ellyn Board. C-8285; 8288-89. Relying on the motion *in limine* ruling, the court not only struck these questions, but barred counsel's further attempts to ask further questions in order to develop the record for appeal. C-8290.

On October 23, Hargrove's counsel attempted to examine Rosch on the use of Hargrove's name to obtain loans from Glen Ellyn, to no avail:

BY MR. KING:

Q. Sir, did you obtain a power of attorney from Mr. Hargrove that you used in making draw requests after March 1, 1981?

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING:

Q. Did you file documents with Glen Ellyn Savings & Loan, or any other lending institution, in Mr. Hargrove's name after March 1, 1981?

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING:

Q. Did you file documents with any lending institution prior to March 1, 1981 in Mr. Hargrove's name?

A. Not to the best of my knowledge, no.

Q. Do you recall submitting documents after March 1—

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING: Judge, I'm entitled to inquire into the witness' recollection. If he says he doesn't recall or he's not sure—

THE COURT: I'm sustaining the objection for lack of relevancy.

MR. KING: I'm sorry?

THE COURT: I'm sustaining the objection for lack of relevancy. After 3/1/8 [sic]—

C-9328-29.

Justice requires that every litigant receive the fair opportunity to provide the court with material evidence in support of his valid claim. A court may regulate the cross-examination of witnesses, but this "[does] not justify an arbitrary denial of the right of a litigant to procure competent testimony . . . when the application therefor is reasonably made and pursued with due diligence according to established rules of procedure." *Evans v. Industrial Accident Commission*, 162 P.2d 488, 491-92 (Cal. App. 1945). "[C]ompetent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue in contradiction of the due process of law clause of the Constitution." *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165, 171 (1935).

In a fraud action brought by Rosch, where the issue of reliance was not only material but a prerequisite for Rosch's case, Hargrove was entitled to wide latitude in testing Rosch's truthfulness and in producing evidence which undermined Rosch's claim and revealed his true motives. *See People v. Mason*, 28 Ill.2d 396, 400-01, 192 N.E.2d 835, 838 (1963).

Illinois courts, like federal courts, can always admit evidence of subsequent acts in order to demonstrate a party's motive, in civil or criminal cases. *See People v. McDonald*, 62 Ill. 2d 448, 343 N.E.2d 489 (1975); *Joseph Taylor Coal Co. v. Dawes*, 122 Ill. App. 389 (1905), *aff'd*, 220 Ill. 145, 77 N.E. 131 (1906). *See also Zimmerman v. First Fed. Sav. and Loan*, 848 F.2d 1047, 1056-57 (10th Cir. 1988); *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977), *cert. denied*, 434 U.S. 843 (1977); Fed. R. Evid. 404(b). In this case, however, because the trial court systematically denied Hargrove the chance to introduce evidence of subsequent acts, it effectively prevented Hargrove from presenting dispositive evidence of Rosch's plan, and his non-reliance on Hargrove. This ruling, upheld by the Illinois Supreme Court, unconstitutionally deprived Hargrove of due process.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS COURTS' EVIDENTIARY RULINGS BARRED PETITIONERS FROM INTRODUCING MATERIAL EVIDENCE DEMONSTRATING THAT RESPONDENT SUFFERED NO LOSS, AND IN SO DOING DEPRIVED PETITIONERS OF PROPERTY WITHOUT DUE PROCESS.

Legal procedures must be consistent with fundamental fairness. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981). Where a court awards damages with nearly unfettered discretion—with no opportunity for a defendant to demonstrate that, in fact, there was no loss—fundamental fairness is wanting and a Fourteenth Amendment due process violation exists. *Federal Deposit Ins. Corp. v. W. R. Grace & Co.*, 691 F. Supp. 87, 99 (N.D. Ill. 1988), *aff'd in pertinent part*, 877 F.2d 614 (7th Cir. 1989).

The Illinois courts' erroneous interpretation of the benefit-of-the-bargain rule—i.e. that John Rosch was injured as a result of Hargrove's "fraud"—unconstitutionally denied Hargrove of property without due process. The trial court

ruled that Rosch did not need to prove that he suffered any loss following his March 1 transaction with Hargrove. The Appellate Court and Illinois Supreme Court affirmed this ruling, and similarly affirmed the lower courts' refusal to consider Hargrove's evidence that Rosch in fact did not suffer loss. The trial court's ruling and denial of evidence on damages, affirmed by the Appellate and Illinois Supreme Courts, was a clear misuse of the benefit-of-the-bargain rule and amounted to a violation of the Fourteenth Amendment to the U.S. Constitution.[5]

The Illinois Supreme Court's ruling on the benefit-of-the-bargain was that:

> [t]he proper measure of damages under the benefit-of-the-bargain rule . . . and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Har-

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[5] On June 26, 1989, this Court issued the decision of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909 (1989). In that case the Court held that the "excessive fines" clause of the Eighth Amendment did not apply to punitive damages awards in cases between private parties. Expressly reserved in *Browning-Ferris* is the question of excessive punitive damage awards in the context of the Fourteenth Amendment; i.e. whether due process acts as a check on a trier of fact's discretion to award punitive damages, in the absence of any statutory limit. *Browning-Ferris*, 109 S. Ct. at 2921.

Hargrove's instant petition is grounded in the court's systematic exclusion of evidence, both on Hargrove's theory of defense and on damages. Hargrove submits, however, that the court's decision to grant over $148,000 in damages to Rosch, notwithstanding its refusal to admit relevant evidence on the question of damages, raises the very question reserved in *Browning-Ferris*. Because the damages awarded here did not compensate for an actual loss suffered by Rosch, they can fairly be termed "punitive." The size alone of this "punitive" damage award, so disportionate to any injury, therefore provides a constitutional basis for reversal of the Illinois court's decision. The $148,000 in damages was so excessive as to violate the Due Process Clause.

> grove and what those liabilities actually were. How Rosch and the joint venture subsequently dealt with those liabilities was irrelevant to this determination.

Opinion at 11.

Illinois' Supreme Court ruled, in essence, that Rosch's presentment of his case on fraud did not have to include a showing of damages, but that damages as determined by the trial court, even without a showing of loss, would be automatically awarded instead.

Illinois courts, like all courts, are supposed to require every plaintiff to show his damages with a "fair degree of probability." *Nisbet v. Yelnick*, 124 Ill. App. 3d 466, 472, 464 N.E.2d 781 (1st Dist. 1984). Particularly where damages are "susceptible to proof in dollars and cents, direct and tangible proof [of injury]" must be offered. *Leon v. Thorlief Larsen and Son, Inc.*, 133 Ill. App. 2d 911, 913, 272 N.E.2d 799 (1st Dist. 1971). The purpose of compensatory damages is to make the plaintiff whole, but certainly not more than whole. *Kassman v. American University*, 546 F.2d 1029, 1033 (D.C. Cir. 1976).

Here, however, the Illinois courts' damage award to Rosch clearly made him "more than whole." Repeatedly, Hargrove's counsel tried to show that Rosch did not demonstrate damage as a result of his transaction with Hargrove, and that, in fact, the liabilities upon which Rosch sought damages were paid either by other persons, by the Rosch-Gerill partnership after Rosch sold his interest in the venture, or not at all. The trial court systematically excluded all of Hargrove's evidence on this subject on grounds that the material was "irrelevant." C-8480-84.

The trial court's decision to ignore Hargrove's proof regarding Rosch's non-payment of liabilities came early

in the trial. C-8434-36. On October 7, Hargrove's counsel asked whether any bills from one contractor were "paid by any entity to which you no longer had an interest [when] . . . the bill was paid?" C-8435. The trial court sustained objections that the evidence was inadmissible because "[a]ll the bills were paid subsequent to March 1." *Id.*

The following day Hargrove's counsel attempted to show that Rosch sold a portion of his partnership interest to Gerill in July, 1981 and the remainder in March, 1982. *See* Har. Ex. 225, 232 (refused). These transfers occurred before most of the purported damages were paid. Pl. Ex. 59; 70-76; Har. Ex. 225 (refused). Evidence regarding Rosch's transfer of ownership was crucial in showing that Rosch claimed and received damages for numerous invoices, even though they were only paid by the partnership after his partnership interest ended, if at all. Again the court excluded such evidence after Rosch objected that documents bearing dates from March, 1982 were "irrelevant." C-8480-84.[6]

In fact, nearly half of Rosch's entire fraud judgment, $69,797.47, related to Hargrove's alleged nondisclosure of debts to two contractors on the parcel known as Oak Hills. Testimony and excluded exhibits proffered by Har-

[6] Ironically, the court readily allowed Rosch to base his own claim for damages on payments made by Woodridge partnerships after Rosch's partnership interest was sold, and gave Hargrove no opportunity to counter. On October 1, 1986, for example, Rosch testified about sums allegedly due him as a result of $40,416 paid "by the Gerill-Rosch partnership" to the contractor Air Aid after March 1. C-7912. Hargrove's counsel's objections to such testimony were overruled, *id.*, and his attempts to cross-examine Rosch to show that Rosch was not a partner when these debts were paid was denied. C-8392; 8433-35.

grove showed that these contractors, Alsterda Cartage and Ready Paving, were supposed to be paid from Glen Ellyn construction loans, C-8368-77; 8157-58; 8161-62; 8666-67; Har. Ex. 127-2 (refused), and that Rosch himself approved these loans in January, 1981. Har. Ex. 115, C-8666-67. But neither Rosch nor anyone else paid Ready Paving; through the construction loans Rosch approved in January, he received *and retained* money intended to pay Ready Paving. Incredibly, the trial court refused to admit material evidence on this crucial point, again, because the evidence related to events after March 1. C-7753; 9368-77; 8739-40.

Hargrove was also found to have intentionally misrepresented $79,950.75 with respect to building permits and bills from the Village of Woodridge. Hargrove testified that, at the time of the March 1 agreement, he disclosed all such bills and permits for which he believed the partnership was liable. C-8721; 8658-59. It defies logic to think that Rosch, a sophisticated real estate attorney and investor, was "fraudulently misled" on the presence or absence of building permits, which were a matter of public record and readily ascertainable by Rosch. This damage award is particularly unjust because Rosch was able to introduce evidence dated after March 1, 1981 to show that the cost of building permits increased after his transaction with Hargrove. C-8721. The courts' damage award was based on this increased amount. If what occurred after March 1, 1981 was truly irrelevant under the benefit-of-the-bargain rule, Rosch should not have been able to receive a windfall based on events after that date. This award, again, constituted a taking of Hargrove's property without due process.

CONCLUSION

For the foregoing reasons, Petitioners Jack L. Hargrove and Jack L. Hargrove Builders, Inc. pray that a Writ of Certiorari issue to review the decision of the Illinois Supreme Court and, upon review, to reverse that Court's decision in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

Docket Nos. 66788, 67035 cons.—Agenda 42—September 1988.

GERILL CORPORATION *et al.*, Appellants and Cross-Appellees, v. JACK L. HARGROVE BUILDERS, INC., *et al.*, Appellees and Cross-Appellants.

JUSTICE CLARK delivered the opinion of the court:

This appeal arises out of a judgment of the circuit court of Du Page County against appellees and cross-appellants, Jack L. Hargrove Builders, Inc. and its president and majority shareholder, Jack L. Hargrove (hereinafter referred to collectively as Hargrove), awarding damages to appellee John F. Rosch for Hargrove's fraudulent misrepresentations. Following the judgment, the circuit court dismissed Hargrove's third-party complaint, which sought contribution under the Illinois Contribution Among Joint Tortfeasors Act (the Contribution Act) (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*) from appellants and cross-appellees, Gerill Corporation and its president and majority shareholder, Gerald A. Heinz. The court dismissed the complaint, holding that intentional tortfeasors are not entitled to contribution under the Contribution Act. The appellate court affirmed the circuit court's decision finding Hargrove liable for fraudulent misrepresentation, but reversed the dismissal of Hargrove's third-party complaint, holding that intentional tortfeasors can receive contribution under the Contribution Act. 165 Ill. App. 3d 1160 (unpublished order under Supreme Court Rule 23).

Gerill and Heinz subsequently filed a petition for leave to appeal (No. 66788) to challenge the appellate court's

holding that intentional tortfeasors are entitled to contribution under the Contribution Act. Hargrove filed a separate petition for leave to appeal (No. 67035) raising questions, which we set out in detail below, about a number of the circuit court's evidentiary and procedural findings. We granted and consolidated both petitions. (107 Ill. 2d R. 315.) As discussed below, we reverse the appellate court's holding with respect to the Contribution Act and affirm its decision upholding the rest of the circuit court's findings.

FACTUAL BACKGROUND

In 1976, Heinz and Hargrove orally agreed that their corporations, Gerill Corporation and Jack L. Hargrove Builders, Inc., would form a joint venture to develop approximately 110 acres of land owned by Gerill in Woodridge, Illinois (the Woodridge properties). Gerill contributed the land and Hargrove managed the development and construction on the land, maintained the joint venture's records and books, and handled its financial affairs. Hargrove also obtained a $352,000 loan in 1978 from the Concordia Federal Savings and Loan Association (the Concordia loan) and then loaned $290,000 to the joint venture to pay off a mortgage held by the Glen Ellyn Savings & Loan Association on a parcel of land in the Woodridge properties.

In December 1980, Hargrove decided that due to the state of the economy at that time, it was unfeasible to continue developing the Woodridge properties as a joint venture. He thus proposed to Heinz that one partner buy out the other's interest in the joint venture. Heinz asked Hargrove to prepare a list of the joint venture's outstanding loans and open invoices, which Hargrove did in January 1981 by giving Heinz a 19-page handwritten list.

Heinz realized that he did not have enough money to purchase Hargrove's interest and so he then approached John Rosch, the president of the Glen Ellyn Savings & Loan Association and an attorney who had represented Gerill and Heinz, with the proposition that Rosch purchase Hargrove's interest in the joint venture. There is a conflict in the evidence as to whether it was Heinz's or Hargrove's idea to approach Rosch. Heinz gave Rosch the 19-page list of loans and open invoices and told him that it had been prepared by Hargrove.

Rosch, Heinz and Hargrove held a meeting on February 7, 1981, after which Rosch prepared a draft contract that Hargrove subsequently refused to sign. A new contract was then prepared (the evidence is unclear as to by whom) which provided that Rosch would purchase Hargrove's interest for $200,000. The contract specified:

> "[T]hat to the best of Jack L. Hargrove Builders, Inc. and Jack L. Hargrove individually's knowledge, they have advised the Gerill Corporation, Gerald A. Heinz and John F. Rosch of any and all open invoices and any and all liabilities in the form of monies due and owing on the properties."

Furthermore, the contract provided that Rosch, Gerill and Heinz would "assume all liabilities and responsibilities for the Woodridge properties and * * * hold [Hargrove] harmless and indemnify same from any and all debts, liabilities and claims of every kind and nature which may arise in reference to said Woodridge properties."

On March 1, 1981, the parties met to sign the contract. Rosch and Heinz testified that Rosch asked Hargrove if the 19 handwritten pages "contain[ed] all of the debts that relate to the Woodridge properties," to which Hargrove replied "Yes, they do." Hargrove denies that Rosch asked him any such question. The parties then signed the contract and on the next day Rosch paid Hargrove the $200,000.

Rosch hired an accountant, Daniel Gilmartin, to review the joint venture's books and records and to assist in their transfer from Hargrove to Rosch. After several months, Gilmartin and Rosch discovered that the joint venture's liabilities were greater than those included in the 19-page handwritten list that had been prepared by Hargrove. A number of liabilities relating to the Woodridge properties had either been omitted from the list or misstated.

PROCEDURAL HISTORY

On November 15, 1982, Rosch, Gerill and Heinz filed a four-count complaint against Hargrove in the circuit court of Du Page County seeking an accounting from Hargrove for Gerill and Heinz, a declaratory judgment for Rosch, and actual and punitive damages for Rosch, Gerill, and Heinz from Hargrove for fraudulent misrepresentation of the joint venture's liabilities. Following various motions and amendments, Rosch, Gerill and Heinz filed two separate complaints: Rosch alleging fraudulent misrepresentation and Gerill and Heinz seeking an accounting. The accounting claim has since been severed from the rest of the case.

On November 18, 1982, Hargrove filed an eight (subsequently amended to nine) count complaint against Rosch, Gerill, Heinz, the Trust Company of Glen Ellyn, and the Beverly Bank in the circuit court of Cook County (both the Trust Company and the Beverly Bank were eventually dismissed from the case.) The complaint was transferred to the circuit court of Du Page County, where it was consolidated with the case previously filed by Rosch, Gerill and Heinz. Soon thereafter, the circuit court dismissed six of the complaint's nine counts. Hargrove then filed a 10-count second amended complaint on September 6, 1983.

The first three counts of Hargrove's second amended complaint involved Hargrove's claim that under the March 1, 1981, contract, which effectuated the transfer of Hargrove's interest in the joint venture, Rosch, Gerill and Heinz were obligated to pay off the $352,000 loan which Hargrove had taken out from the Concordia Federal Savings and Loan Association. In counts I and II, Hargrove sought injunctive relief to require Rosch, Gerill and Heinz to continue making payments on the loan to prevent a mortgage foreclosure action from being brought against Hargrove during the proceedings and an order for specific performance requiring them to assume the mortgage or provide an irrevocable letter of credit for the loan at Concordia. Count III sought the same relief based upon a claimed "Conspiracy to Defraud." Count IV sought to prevent or rescind certain allegedly fraudulent conveyances by Rosch, Gerill and Heinz of their interest in the Woodridge properties without sufficient consideration "contrary to the rights of Hargrove * * * and contrary to the obligations of Heinz to Hargrove." Counts V and VI sought $30,000 in damages based upon breach of contract and promissory estoppel arguments arising out of an alleged default by Rosch, Gerill and Heinz in repaying an alleged $50,000 loan made to them by Hargrove. Counts VII and VIII were also based upon breach and estoppel arguments concerning an alleged agreement between Rosch, Gerill, Heinz, and an architect who worked on the Woodridge properties. Count IX sought rescission of the March 1 contract and restitution from Rosch, Gerill and Heinz. Count X was an action for contribution from Gerill and Heinz in the event Hargrove was found liable to Rosch for fraudulent misrepresentation.

On January 31, 1984, Hargrove brought a motion for change of venue based upon the alleged prejudice of the

circuit court judge in the case. Because it was brought well after substantial issues had been ruled upon, such as the dismissal of Hargrove's first amended complaint, the judge did not grant the motion as a matter of right. He did, however, assign the motion to another judge of the circuit court for a hearing to determine whether he, the original judge, was prejudiced. After extensive argument by both parties, it was concluded that there was no prejudice against Hargrove; the motion was denied.

Rosch, Gerill and Heinz then filed a motion to dismiss most of Hargrove's second amended complaint, which the judge granted, dismissing counts I, II, III, IV, VII, VIII, IX, and X of the complaint with prejudice. Hargrove was granted leave to amend counts VII and VIII. Hargrove then filed another motion for change of venue, alleging again that the judge was prejudiced. This time, the motion was granted and the case was transferred to a different judge of the circuit court of Du Page County.

On February 7, 1985, Hargrove sought leave to file an 11-count third amended complaint. Counts I through X of the complaint were very similar to counts I though X of Hargrove's second amended complaint. Count XI was a new claim for "Contractual Indemnification" arising out of the $352,000 Concordia loan. However, the judge would not grant Hargrove leave to file except for counts V through VIII. Hargrove was denied leave to file counts I through IV, IX and X because those counts had previously been dismissed with prejudice by the original judge in the case. Count XI of the third amended complaint was denied with leave to replead because the new judge in the case found it to be illogical on its face. In a later order, Hargrove was granted leave to file counts I and IX against Rosch because the original judge's order had dismissed those counts only as to Gerill and Heinz, not as to Rosch.

Soon thereafter, Hargrove repled a count for contractual indemnification by adding a count XII to its third amended complaint. On September 19, 1985, Hargrove's counts I, VI and IX were dismissed without leave to replead, and count XII was dismissed with leave to replead one final time for breach of contract arising out of the Concordia loan. Count VIII of the complaint was later dismissed. Hargrove subsequently filed an amended count XIII for contractual indemnification and breach of contract.

In September 1986, both Rosch (joined by Gerill and Heinz) and Hargrove filed cross-motions for summary judgment on count XIII of Hargrove's complaint. Hargrove's response to Rosch's motion consisted entirely of its responsive pleading: no affidavits or evidence of any type were attached. At the hearing on the motions for summary judgment, Hargrove attempted to support its response to Rosch's motion by using exhibits attached to Hargrove's motion for summary judgment. In ruling on Rosch's motion, however, the trial court judge would only consider matters included in or with Rosch's motion and Hargrove's response to Rosch's motion: she would not consider matters raised in Hargrove's separate motion for summary judgment. Accordingly, Rosch's motion for summary judgment was granted because Hargrove failed to present any evidence of an indemnity running to Hargrove in relation to the Concordia loan. Hargrove later filed a motion to reconsider the summary judgment order, which the trial court denied, stating:

> "Hargrove had ample time to gather evidence and prepare for the September 26, 1986 hearing on the motion for summary judgment.
>
> The question at issue was whether [Hargrove] had any liability on a $352,000 Concordia mortgage undertaken by Beverly State Bank as Trustee and had

made any payments on it for which counterdefendants had failed to indemnify them. Any payments made would be a matter particularly within the knowledge of Hargrove.

Yet Hargrove submitted nothing raising a question of fact on the issue either in response to the motion or in support of Hargrove's cross motion. Hargrove now fails to show that by exercising even a pedestrian level of diligence it could not have submitted whatever else it desired to put before the court on the issue at the time the motion was heard."

The case went to trial on September 29, 1986, on Rosch's claim of intentional misrepresentation and Hargrove's $30,000 counterclaim arising out of its alleged $50,000 loan to Rosch, Gerill and Heinz. It is not clear from the record what became of count VII of Hargrove's complaint, which alleged a breach of contract arising out of an agreement with an architect who worked on the Woodridge properties. After a 17-day bench trial, the court found that Hargrove intentionally misrepresented the liabilities of the joint venture in an amount over $1.1 million. However, the court determined that Rosch was not justified in relying on some of the misrepresentations and so reduced the amount to almost $300,000, which was then reduced to $148,799.69 to reflect Rosch's one-half interest in the joint venture. The court also ruled against Hargrove on Hargrove's counterclaim for $30,000.

During the course of the trial, Hargrove was granted leave to file a third-party complaint for contribution under the Illinois Contribution Act (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*) against Gerill and Heinz based upon the allegedly fraudulent misrepresentations they made to Rosch. Hargrove, apparently without leave of the court, subsequently filed a two-count amended third party complaint for contribution based upon Gerill and Heinz's either fraud-

ulent (count I) or negligent (count II) misrepresentations. Gerill and Heinz then filed a motion to dismiss Hargrove's third amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 100, par. 2-619).

The hearing on Gerill and Heinz's motion to dismiss was after the judgment had been entered in the case for Rosch. At the hearing, the court allowed Hargrove to argue both its fraudulent and negligent misrepresentation theories, without objection by Gerill and Heinz, even though the negligence count had been filed without leave of court. On February 13, 1987, the trial court dismissed both counts of Hargrove's complaint. The dismissal of count I was based upon the first district's holding in *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 445, that intentional tortfeasors have no right to contribution under the Contribution Act. Count II was dismissed because the trial court found that "[t]he evidence show[ed] that Gerill and Heinz were not in the business of supplying information for the guidance of others in their business transaction. Consequently, an element of negligent misrepresentation is missing." The trial judge, "[i]n the interests of having substance prevail over form or a dispute on procedure," also found alternatively that "[i]f the claim were submitted on the merits, [her] judgment would be for [Gerill and Heinz] on both theories" because the evidence failed to show that Gerill and Heinz were either "in the business of supplying information for the guidance of others in their business transactions," or that they "made any intentional misrepresentation to [Rosch] or did anything pertinent other than to pass along to [Rosch] the intentional misrepresentations of Hargrove."

The appellate court affirmed all of the trial court's rulings except for its dismissal of Hargrove's third-party complaint for contribution. (165 Ill. App. 3d 1169 (unpublished order under Supreme Court Rule 23).) The court recognized that there was a conflict among the appellate districts on the contribution issue: the second district, in *Dovin v. Winfield Township* (2d Dist. 1987), 164 Ill. App. 3d 326, had found that intentional tortfeasors have a right to contribution under the Contribution Act, while the first district, in *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 445, had concluded that no such right exists. The court also noted that the fifth district, in *Pipes v. American Logging Tool Corp.* (5th Dist. 1985), 139 Ill. App. 3d 269, had held that willful and wanton tortfeasors are entitled to contribution. Following its earlier decision in *Dovin*, the appellate court below held that intentional tortfeasors are entitled to contribution and so reversed the circuit court's dismissal of count I of Hargrove's complaint. The court also determined "that the trial court erred in determining controverted facts and dismissing count II of the complaint pursuant to a section 2-619 motion." Accordingly, the case was remanded to the circuit court to consider the merits of Hargrove's contribution claim. We then granted and consolidated Gerill and Heinz's and Hargrove's petitions for leave to appeal.

HARGROVE'S APPEAL NO. 67035

In its appeal, Hargrove claims that the appellate court was wrong in affirming the circuit court's:

(1) finding that Hargrove fraudulently misrepresented the joint venture's liabilities;

(2) finding for Rosch, Gerill and Heinz on Hargrove's counterclaim for $30,000;

(3) dismissal of most of Hargrove's third amended complaint;

(4) granting of summary judgment for Rosch, Gerill and Heinz on count XIII of Hargrove's third amended complaint; and

(5) allowing Rosch to appear as an attorney for himself and with co-counsel during trial.

We begin our analysis of Hargrove's claims by recognizing that a trial court's determination that the elements for fraudulent misrepresentation have been established is a factual one. As such, it will not be disturbed unless it is contrary to the manifest weight of the evidence. (*W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.* (1986), 115 Ill. 2d 119, 127; *Brown v. Broadway Perryville Lumber Co.* (1987), 156 Ill. App. 3d 16, 23.) The elements of the tort of fraudulent misrepresentation are:

> "(1) [a] false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in [justifiable] reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Soules v. General Motors Corp.* (1980), 79 Ill. 2d 282, 286.

Hargrove first argues that the circuit court incorrectly concluded that Hargrove made untrue statements. It is undisputed, however, that certain liabilities of the joint venture were either misstated or omitted from the 19-page list. Furthermore, both Rosch and Heinz testified that immediately prior to signing the March 1, 1981, contract, Hargrove answered "yes" when Rosch asked if the 19-page list was a complete list of the joint venture's liabilities. Accordingly, we will not overturn the circuit court's findings.

Hargrove further maintains that even if misrepresentations were made, Hargrove made them without actually knowing that they were false and so cannot be held liable for fraudulent misrepresentation. However, it is well established that a misrepresentation is fraudulent either where a party makes the representation knowing it is false *or* where the misrepresentation was made with a reckless disregard for its truth or falsity. (See *McMeen v. Whipple* (1961), 23 Ill. 2d 352, 355; *Buechin v. Ogden Chrysler-Plymouth, Inc.* (1987), 159 Ill. App. 3d 237, 247; W. Prosser & W. Keeton, Torts, §107, at 741-42 (5th ed. 1984).) In this case, the court, based upon evidence submitted by Rosch, found that Hargrove misrepresented the joint venture's liabilities by about $1.1 million. Even though Hargrove claims this misrepresentation was due to inadvertence, our review of the record indicates that it was reasonable for the circuit court to conclude that Hargrove, the party with exclusive control of the joint venture's books, records and financial affairs, either knowingly misrepresented the liabilities of the joint venture, or did so with a reckless disregard for whether the representations were truthful.

Hargrove next argues that Rosch did not have a right to rely upon Hargrove's misrepresentations; *i.e.*, that Rosch's reliance was unjustified. Hargrove claims that Rosch had no right to rely on the misrepresentations because Rosch could have made an effort to examine the joint venture's records himself to verify Hargrove's representations.

In addressing the issue of reliance, the circuit court disallowed recovery for over $800,000 of the almost $1.1 million in liabilities that it found Hargrove had misrepresented because the court found that Rosch's reliance

was unjustified. The disallowed items were taxes, mortgages and loans whose existence, the circuit court concluded, could have been ascertained by Rosch through reasonable and prudent diligence. The recoverable items consisted of bills for construction work and supplies, and damages arising out of a lawsuit that had been filed against the joint venture in Cook County. In allowing recovery, the circuit court explained:

> "Considering that Mr. Rosch was coming into a joint venture that had been conducted for years without any written agreement, with Mr. Hargrove having almost autonomous charge of authorizing payment for construction work and other services rendered to the venture, Mr. Rosch was justified in relying upon Mr. Hargrove's representation as to this type of liability. These kinds of liabilities fluctuate and are difficult to verify at any point in time, let alone to identify at all."

We find that the circuit court's reasoning is supported by the record in this case and is consistent with the rule that one is justified in relying upon the representations of another, without independent investigation, where the person to whom the representations are made does not have the same ability to discover the truth as the person making the representations. (*Bundesen v. Lewis* (1938), 368 Ill. 623, 633; *Glazewski v. Allstate Insurance Co.* (1984), 126 Ill. App. 3d 401, 408, *rev'd in part on other grounds* (1985), 108 Ill. 2d 243; 37 C.J.S. *Fraud* §34, at 279 (1943).) In this case, the existence of the Cook County lawsuit and information regarding the joint venture's construction costs, unlike taxes, mortgages and loans, were matters almost exclusively within the knowledge of Hargrove and it would have been difficult, if not impossible, for Rosch to discover them.

We also agree with the circuit court's finding that Rosch relied upon Hargrove's misrepresentations. Rosch testified that he used the 19-page list of liabilities to assess the value of the joint venture, that they were the only records he reviewed to determine the joint venture's liabilities, and that he relied upon them in deciding to purchase Hargrove's interest in the joint venture. Nothing in the record compels a contrary conclusion.

Hargrove's final argument with respect to the fraudulent misrepresentation claim is that the circuit court's computation of damages was incorrect. Hargrove claims that under the benefit-of-the-bargain rule, damages for fraudulent misrepresentation must be based upon the amount of money the plaintiff paid as a result of the misrepresentation. Thus, Hargrove argues, the circuit court should not have excluded evidence that the misrepresented liabilities were either never paid or were not paid until after Rosch sold his interest in the joint venture. We disagree.

Under the benefit-of-the-bargain rule, which governs the damage computations in fraudulent misrepresentation cases, damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true. (*Hicks v. Deemer* (1900), 187 Ill. 164, 170; *Munjal v. Baird & Warner, Inc.* (1985), 138 Ill. App. 3d 172, 186-87; *Kinsey v. Scott* (1984), 124 Ill. App. 3d 329, 341.) In this case, it was found that Hargrove represented the joint venture's liabilities as being less than they actually were. The proper measure of damages under the benefit-of-the-bargain rule, then, and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Hargrove and what those liabilities actually were. How Rosch or the

joint venture subsequently dealt with those liabilities was irrelevant to this determination. Our review of the record also convinces us that the results arrived at by the circuit court in applying the benefit-of-the-bargain rule were amply supported by the evidence.

We similarly find no merit in Hargrove's argument that the circuit court should not have denied Hargrove's counterclaim for $30,000 in damages arising out of an alleged $50,000 loan made by Hargrove to Rosch, Gerill and Heinz. Hargrove claims that he deposited the $50,000 loan into a checking account and that he used these funds to pay certain bills for Rosch, Gerill and Heinz. However, neither Rosch nor Heinz ever signed a note for the alleged loan. Similarly, the checking account was controlled by Hargrove and none of the alleged "borrowers" had access to the account. There was also evidence that the account had a negative balance exceeding $17,000 immediately prior to the deposit of the $50,000 and that Hargrove subsequently withdrew $20,000 from the account for his own use. Furthermore, it was undisputed that Hargrove also deposited into the account over $50,000 that was actually Rosch and Heinz's money. Finally, much of the evidence in support of Hargrove's claim was the testimony of Hargrove and Hargrove's secretary, Susan Peloza, both of whose testimony the trial judge found "incredible." As a result, the trial judge concluded that there was "a noticeable lack of supporting documentation" for Hargrove's claim.

We will not overturn a trial court's evidentiary findings unless they are against the manifest weight of the evidence. (*Schulenburg v. Signatrol, Inc.* (1967), 37 Ill. 2d 352, 356.) This is because:

> "where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court

> of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof." (*Schulenburg*, 37 Ill. 2 at 356.)

Upon review, we conclude that the trial court's determinations were amply supported by the record. Accordingly, we affirm the trial court's finding for Rosch, Gerill and Heinz on Hargrove's $30,000 counterclaim.

Hargrove next claims that the circuit court erred in dismissing various counts of Hargrove's third amended complaint. The second judge in the case dismissed the counts of Hargrove's complaint because the original judge had previously dismissed similar counts in Hargrove's second amended complaint with prejudice. The second judge explained that she:

> "decline[d] to exercise discretion to readjudicate orders entered by the [original judge] in view of the length of time this cause has been pending, about three years, the stage of development, the Sec. 2-615 motions in progress, and the court file reflecting that Hargrove's motion for change of venue from [the original judge] was presented after his rulings on substantive issues, had been made."

Hargrove does not challenge the original judge's order dismissing counts of the second amended complaint. Instead, Hargrove argues that the original judge's rulings should have been disregarded by the subsequent judge. In support of this argument, Hargrove cites the rule that where a judge errs in denying a petition for change of venue, any orders entered thereafter by that judge are void. (See *Board of Education v. Morton Council, West Suburban Teachers Union Local 571* (1972), 50 Ill. 2d 258, 261-62.) From this rule, Hargrove leaps to the conclusion that Hargrove somehow demonstrated that the original judge was prejudiced and so his rulings should have been

disregarded. We disagree, however, because we do not believe that prejudice was ever demonstrated.

As discussed earlier, the original judge denied Hargrove's first petition for change of venue because neither he nor the judge who conducted a hearing on the issue found that there was prejudice against Hargrove. The court then dismissed most of Hargrove's second amended complaint. Eight months later, Hargrove brought another petition for change of venue, which was ultimately granted. However, the order was not based upon a showing of prejudice. Rather, the petition was granted because of justifiable exasperation by what the judge called the "unprofessional conduct" of Hargrove's attorneys in repeatedly making baseless allegations that the judge was prejudiced. Thus, prejudice on the original judge's part was never demonstrated and so the question of whether his rulings should have been followed was entirely within the subsequent judge's discretion. (See *McClain v. Illinois Central Gulf R.R. Co.* (1988), 121 Ill. 2d 278, 287.) We find no abuse of that discretion here.

The fourth argument advanced by Hargrove is that the circuit court erred in granting summary judgment for Rosch, Gerill and Heinz on Hargrove's counterclaim for contractual indemnification with regard to the $352,000 Concordia loan. Hargrove argues that the following "facts" do not support the circuit court's summary judgment order: (1) the loan was obtained to pay obligations on the Woodridge properties; (2) the joint venture treated the loan as a liability for the Woodridge properties; (3) the loan was included on the 19-page list of the joint venture's liabilities; (4) all Woodridge's obligations were assumed by Rosch, Gerill and Heinz under the March 1, 1981, agreement; (5) Rosch, Gerill and Heinz paid the loan for 13 months and obtained a loan extension; (6) Rosch,

Gerill and Heinz stopped paying the loan; (7) after Rosch, Gerill and Heinz stopped paying the loan, Concordia placed a claim against Hargrove for payment and then proceeded to file a foreclosure action against Hargrove, and Concordia then assigned the loan to the Intercounty Title Company of Illinois, which then filed a foreclosure action against Hargrove and continues to hold Hargrove responsible for over $450,000; and (8) Hargrove testified that his obligations on the Concordia loan have not been extinguished.

Even assuming these statements to be true, Hargrove has still failed to provide any factual basis supporting a key element of his claim for indemnity. It is clear that a cause of action on an indemnity agreement does not arise until the indemnitee either has had a judgment entered against him for damages, or has made payment or suffered actual loss. (*Fidelity & Deposit Co. v. Rosenmutter* (N.D. Ill. 1985), 614 F. Supp. 348, 351 (applying Illinois law); 42 C.J.S. *Indemnity* §14, at 588-89 (1944).) Nothing in the "facts" listed by Hargrove in its briefs before us, or in the evidence submitted to the circuit court below, indicates that Hargrove has suffered any actual loss as a result of the Concordia loan. Nor has there been a judgment against Hargrove for damages arising out of the loan. Accordingly, the circuit court was correct in granting summary judgment against Hargrove on Hargrove's claim for indemnification.

Hargrove's final contention is that the circuit court erred in allowing Rosch to represent himself at trial while also being represented by co-counsel. According to Hargrove, the circuit court's decision is contrary to Illinois law. Hargrove supports this argument by citing a number of criminal cases in which this and other courts have stated that an accused does not have the right to both act

pro se and be represented by counsel. See, *e.g.*, *People v. Ephraim* (1952), 411 Ill. 118, 122 ("An accused has either the right to have counsel act for him or the right to act himself. * * * [I]t is obvious that both of those rights cannot be exercised at the same time"); *People v. Page* (1987), 152 Ill. App. 3d 957, 959 ("There is no right, whether by Federal or State constitution, State statute or by common law, to combine representation *pro se* and by counsel").

We have examined the cases cited by Hargrove and conclude that though a party is not entitled as a matter of right to be represented both *pro se* and by counsel, it is within a trial court judge's discretion to allow such dual representation. Our view is in accord with the opinions of Federal and State courts that have considered the issue. (See, *e.g.*, *O'Reilly v. New York Times Co.* (2d Cir. 1982), 692 F.2d 863, 868; *United States v. Hill* (10th Cir. 1975), 526 F.2d 1019, 1024; *State v. Cannon* (Ariz. App. 1980), 127 Ariz. 147, 149, 618 P.2d 641, 643; *Hooks v. State* (Del. 1980), 416 A.2d 189, 198; *Wallace v. State* (1977), 267 Ind. 43, 45, 366 N.E.2d 1176, 1177; *State v. Ames* (1977), 222 Kan. 88, 101, 563 P.2d 1034, 1045; *Callahan v. State* (1976), 30 Md. App. 628, 634, 354 A.2d 191, 194; *State v. Velanti* (Mo. 1960), 331 S.W.2d 542, 546; *State v. McCleary* (1977), 149 N.J. Super. 77, 80, 373 A.2d 400, 401.) Based upon our review of the record, we hold that the trial court judge did not abuse her discretion in allowing Rosch to both act as his own attorney and be represented by co-counsel.

GERILL AND HEINZ'S APPEAL NO. 66788

We turn now to the question raised by Gerill and Heinz of whether intentional tortfeasors are entitled to contribution under the Illinois Contribution Among Joint Tort-

feasors Act (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*). This question of statutory interpretation has divided the districts of the appellate court in this State. (See *Dovin v. Winfield Township* (2d Dist. 1987), 164 Ill. App. 3d 326, 344 (intentional tortfeasors are entitled to contribution); *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 455, 456 (intentional tortfeasors are not entitled to contribution); see also *Pipes v. American Logging Tool Corp.* (5th Dist. 1985), 139 Ill. App. 3d 269, 274 (willful and wanton tortfeasors are entitled to contribution).) To answer, we must determine the General Assembly's intent in enacting the Contribution Act.

Hargrove argues that the intent of the legislature can be ascertained by the language of the Contribution Act itself. Where the language of a statute "is unambiguous, a court must enforce the law as enacted without considering other aids." (*County of Du Page v. Graham, Anderson, Probst & White, Inc.* (1985), 109 Ill. 2d 143, 151.) The Contribution Act provides, in part:

> "§2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." (Ill. Rev. Stat. 1987, ch. 70, par. 302.)

The statute does not differentiate between intentional and nonintentional torts or tortfeasors. Nor does the statute explicitly limit itself to nonintentional torts. Instead, it uses the term "persons liable in tort" and "tortfeasors." Hargrove asserts that the word "tort" is normally and popularly understood to include both intentional and nonintentional torts, and so Hargrove claims that the statute's

language clearly provides intentional tortfeasors with a right of contribution. We disagree, however, because we find that the meaning of the term "tort" is ambiguous.

Although phrases like "negligent tort" and "intentional tort" are fairly susceptible to definition, the meaning of the term "tort," by itself, is not so clear. As Prosser stated in his treatise on torts:

> "[A] really satisfactory definition of a tort is yet to be found. The numerous attempts which have been made to define the term have succeeded only in achieving language so broad that it includes other matters than torts, or else so narrow that it leaves out some torts themselves." (W. Prosser & W. Keeton, Torts §1, at 1-2 (5th ed. 1984).)

Similarly, Wigmore stated that "Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract." (1 J. Wigmore, Select Cases on the Law of Torts, at vii (1912), quoted in W. Prosser & W. Keeton, Torts §1, at 2 n.3 (5th ed. 1984).) One such ambiguous statement was this court's definition of a tort as " 'an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action of contract.' " (*Morris v. Jamieson* (1903), 205 Ill. 87, 105, quoting F. Pollock, Law of Torts 4.) Clearly, the problems courts and commentators have had in defining the term indicate that the meaning of the word "tort" is ambiguous. Due to this ambiguity, it is appropriate for us to look to the legislative history of the Contribution Act to aid in determining the General Assembly's intent. *People v. Boykin* (1983), 94 Ill. 2d 138, 141.

This court has frequently noted that the General Assembly enacted the Contribution Act to codify the decision

in *Skinner v. Reed-Prentice Division Package Machinery Co.* (1977), 70 Ill. 2d 1, in which this court discarded the no-contribution-among-tortfeasors rule. (See, *e.g.*, *Doyle v. Rhodes* (1984), 101 Ill. 2d 1, 8-9; *Coney v. J.L.G. Industries, Inc.* (1983), 97 Ill. 2d 515, 521-22.) As a result, an examination of the opinion in *Skinner* is appropriate to help ascertain whether the General Assembly intended to create a right of contribution for intentional tortfeasors.

In *Skinner*, this court held that a defendant in a strict liability action could maintain a cause of action against a third party for contribution. (*Skinner*, 70 Ill. 2d at 16.) Before *Skinner*, tortfeasors were not entitled to contribution in Illinois. The origin of this rule was the English case of *Merryweather v. Nixan* (K.B. 1799), 101 Eng. Rep. 1337. However, as this court explained in *Skinner*, *Merryweather* had been misapplied by the great majority of American courts, including Illinois courts, to stand for a rule prohibiting contribution for all tortfeasors. What *Merryweather* actually held was that there is no right to contribution for *intentional* tortfeasors. *Merryweather* did not change the general rule that nonintentional tortfeasors were entitled to contribution. (*Skinner*, 70 Ill. 2d at 8-9.) Thus, this court concluded in *Skinner* "that there is no valid reason for the continued existence of the no-contribution rule." *Skinner*, 70 Ill. 2d at 13.

One justice who dissented from the majority opinion in *Skinner* noted that though the majority's discussion of *Merryweather* suggested that the rule against contribution was still in force for intentional tortfeasors, the majority did not make this explicit. Consequently, the dissent found it necessary to "state clearly that it is being retained." *Skinner*, 70 Ill. 2d at 19 (Ward, C.J., dissenting).

Hargrove incorrectly interprets the decision in *Skinner* as abolishing the no-contribution rule for all tortfeasors.

Skinner held only that a right of contribution exists for a defendant in a strict liability action. The issue of whether contribution exists for intentional tortfeasors was not before the court and therefore was not addressed. However, as noted by the dissent in *Skinner*, the majority's reliance on the *Merryweather* decision, which held that intentional tortfeasors were not entitled to contribution, indicates that the no-contribution rule for intentional tortfeasors was being retained.

Our reading of the *Skinner* decision is consistent with the General Assembly's reading of the case prior to enacting the Contribution Act. Nothing in the legislative history of the Contribution Act indicates that the General Assembly, in codifying the *Skinner* decision, intended to create a right of contribution for intentional tortfeasors. Instead, statements made during the floor debates by both the Senate and House sponsors of the bill that was to become the Contribution Act demonstrate that the statute was meant to create a right of contribution for negligent tortfeasors. Senator Berman stated:

> "This is a bill that addresses a problem that arose from a Supreme Court decision known as the Skinner case. Skinner versus Reed Prentice in which the question of the obligation of different defendants in a tort action . . . *negligence* action would be resolved." (Emphasis added.) (81st Ill. Gen. Assem., Senate Proceedings, May 14, 1979, at 173.)

Similarly, Representative Daniels explained:

> "When you have people that are responsible for monetary damages and there's more than one person and they have been *negligent* resulting in a judgment entered against more than one person, they are called joint tortfeasors. What this Bill says is that they should be responsible to pay their prorate [*sic*] share, and if this has not occurred, that the parties

> between themselves may have an action. Now, this is a result of the Skinner versus Reed decision handed down by the Illinois Supreme Court." (Emphasis added.) 81st Ill. Gen. Assem., House Proceedings, June 14, 1979, at 22.

Hargrove argues that the Senate indicated an intent to include intentional tortfeasors in the Contribution Act by deleting a clause from the original bill that would have expressly excluded a "right of contribution in favor of any tortfeasor who had intentionally either caused or contributed to the injury or wrongful death." (See Committee Amendment I to Senate Bill 308.) We note initially that this is not a case where the full Senate deleted statutory language after full debate on the Senate floor. Instead, the language here was deleted by the Senate Judiciary Committee and adopted without discussion by the full Senate before the bill went to the House. As a result, no record containing information as to why the clause was deleted exists. It could be, contrary to Hargrove's assertion, that the clause was originally drafted in response to the dissent in *Skinner* and deleted only to align the bill closer to the majority's opinion, which was also silent on the matter. Whatever the case may be, we will not engage in speculation to determine the legislature's intent in deleting the clause. Accordingly, we are not persuaded that the deletion of the clause regarding intentional tortfeasors, without any indication as to why it was deleted, is in any way indicative of the General Assembly's intent. See *Rastelli v. Warden, Metropolitan Correctional Center* (2d Cir. 1986), 782 F.2d 17, 24 n.3; *Maiter v. Chicago Board of Education* (1980), 82 Ill. 2d 373, 385.

We conclude, therefore, that intentional tortfeasors are not entitled to contribution under the Illinois Contribution Among Joint Tortfeasors Act (Ill. Rev. Stat. 1987,

ch. 70, par. 301 *et seq.*). We thus overrule the decision in *Dovin v. Winfield Township* (2d Cir. 1987), 164 Ill. App. 3d 326, which held to the contrary. We also reverse that part of the appellate court's decision that held that there is a right to contribution for intentional tortfeasors. We affirm the rest of the appellate court's decision upholding the circuit court's findings with respect to Rosch's and Hargrove's claims and counterclaims.

No. 66788—Appellate court reversed;
circuit court affirmed.
No. 67035—Judgment affirmed.

WARD and CALVO, JJ., took no part in the consideration or decision of this case.

APPENDIX B

SUPREME COURT OF ILLINOIS

Springfield, Illinois, May 26, 1989

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

* * *

Nos. 66788—Gerill Corporation, etc., et al., appellants, v.
67035 Jack L. Hargrove Builders, Inc., etc., et al.,
Cons. appellees. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Ward and Calvo, JJ., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 5, 1989.

APPENDIX C

[FILED MARCH 7, 1988]

No. 2-87-0233

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

GERILL CORPORATION, an Illinois corporation, and GERALD A. HEINZ and JOHN F. ROSCH, individuals,

Plaintiff, Counter-Defendants, Appellees and Cross-Appellant,

v.

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Defendants, Counter-Plaintiffs, Appellants and Cross-Appellees.

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Third Party Plaintiffs and Appellants,

GERILL CORPORATION, an Illinois corporation, and GERALD A. HEINZ, an individual,

Third Party Defendants and Appellants.

Appeal from the Circuit Court of DuPage County
No. 82 CH 1032
Hon. Helen C. Kinney and
Hon. John S. Teschner, **Judges Presiding**.

C2

ORDER PURSUANT TO SUPREME COURT RULE 23

Defendants, Jack L. Hargrove and Jack L. Hargrove Builders, Inc. (hereinafter referred to as Hargrove), appeal from a judgment of the circuit court which found that Hargrove had intentionally misrepresented liabilities of a joint venture sold to plaintiff, John F. Rosch, and awarded Rosch $148,799.69 in compensatory damages. The judgment also denied count V of Hargrove's counterclaim against counterdefendants, Rosch; Gerill Corporation (Gerill); and the president of Gerill, Gerald A. Heinz, based on breach of contract. In a supplemental order, the court dismissed Hargrove's third-party complaint which sought contribution from Gerill and Heinz. Hargrove also appeals the summary judgment entered on count XIII of Hargrove's counterclaim against Rosch, Gerill, and Heinz for breach of contract and contractual indemnification. Hargrove further asserts error in the trial court's denial of a change in venue and in certain orders relating to discovery.

Rosch cross-appeals from the trial court's denial of prejudgment interest on the judgment.

This litigation arose out of a joint venture to develop real estate entered into between some of the parties. In 1976, plaintiff, Gerill, and defendant, Hargrove, orally agreed to develop, through a joint venture, approximately 110 acres of land in Woodridge, Illinois ("Woodridge properties"). In 1978, Hargrove borrowed $352,000 from Concordia Federal Savings and Loan ("Concordia loan"), and the sum of $290,000 was loaned to the joint venture and used to retire a mortgage indebtedness on the Woodridge properties. In December 1980, Hargrove informed Heinz that he believed that the joint venture was no longer worth pursuing given the current economic conditions, and that either Gerill or Hargrove should take over

the development of the Woodridge properties. Hargrove offered to sell his interest in the joint venture to Gerill. Heinz expressed interest in Hargrove's proposition, and requested that Hargrove prepare a list of outstanding loans for the Woodridge properties and a list of open invoices. Hargrove, who maintained the books and records of the joint venture, compiled these lists in January 1981.

In mid-January, Heinz approached Rosch, an attorney who had represented Gerill and Heinz, and proposed that Rosch buy Hargrove's interest in the joint venture and join Gerill as a partner in the development of the Woodridge properties. Heinz told Rosch that Hargrove had prepared the lists of loans and invoices, and Rosch, based upon the information provided by Heinz, including Hargrove's list of liabilities, offered to pay Hargrove $200,000 for its interest in the joint venture. Hargrove accepted Rosch's offer.

On March 1, 1981, Hargrove, Gerill, Heinz, and Rosch executed an agreement ("March Agreement") under which Hargrove agreed to sign over his interest in the Woodridge properties for $200,000. The March Agreement provided that to the best of Hargrove's knowledge, they had advised Gerill, Heinz, and Rosch of all open invoices and liabilities on the Woodridge properties. The agreement further provided that Gerill, Heinz, and Rosch would assume all liabilities and responsibilities for the Woodridge properties and would indemnify Hargrove from all debts, liabilities, and claims which may arise in reference to the Woodridge properties. Rosch testified that before signing the March Agreement, he asked Hargrove whether the lists of loans and invoices contained all of the debts related to the Woodridge properties, and Hargrove told him that it did. Heinz also testified that Hargrove said that the list of outstanding debts was complete.

Daniel Gilmartin, an accountant employed by Rosch, testified that prior to the March Agreement he was unable to create a balance sheet for the joint venture as of March 1, 1981, because he had received inadequate records from Hargrove concerning assets and liabilities. Gilmartin stated that he never received from Hargrove records that would indicate the amounts owed on the Woodridge properties on March 1, 1981. Susan Peloza, Hargrove's corporate secretary, testified that Gilmartin was given all Hargrove's records.

Hargrove testified that after the March Agreement, Heinz requested that Hargrove pay certain pre-existing obligations for the Woodridge properties, and Hargrove deposited $50,000 in a bank account for the purpose of doing so. Hargrove wrote two checks totaling $20,000 from this account to himself, and Peloza testified that she sent a letter to Gilmartin requesting that $30,000 be repaid to Hargrove.

During the ensuing months following the March Agreement, Rosch ascertained that several debts, which had a material effect upon the liabilities of the joint venture, were either omitted from the list or misstated by Hargrove. On November 15, 1982, Gerill, Heinz, and Rosch, filed their complaint alleging fraud.

On November 18, 1982, Hargrove filed a complaint in the circuit court of Cook County which was subsequently transferred to Du Page County, and consolidated with the other action. Hargrove filed an amended complaint and a second amended complaint. In April 1984, the trial court entered an order dismissing, *inter alia*, counts alleging breach of contract, fraud, and fraudulent conveyances by Gerill, Heinz, and Rosch.

Hargrove filed a third amended complaint in 1985, and in September 1986, the court entered summary judgment for Rosch, Gerill, and Heinz on count XIII of Hargrove's third amended complaint which alleged a breach of contract on the Concordia loan.

After 17 days of bench trial, the trial court issued a letter of opinion on December 18, 1986, in which it found that: (1) Hargrove was guilty of intentional misrepresentation, and awarded damages to Rosch; (2) Hargrove was not entitled to recover on his counterclaim for the $30,000 balance on an alleged loan to the joint venture; and (3) the circuit court should not reconsider its summary judgment on count XIII of Hargrove's complaint. The trial court also noted that this litigation was sometimes made "unnecessarily complex" by the parties.

In January 1987, Rosch filed a motion for prejudgment interest and on February 13, 1987, the court entered two judgment orders which generally conformed to findings set forth in its letter of opinion. In addition, the court dismissed Hargrove's third party complaint against Gerill and Heinz for contribution, and denied interest on the judgment against Hargrove for fraud. This appeal followed.

Hargrove first contends that the evidence was insufficient to establish that he made intentional misrepresentations regarding the liabilities of the Woodridge properties. Hargrove argues that he made no misrepresentations, he lacked the intent to deceive, and Rosch had no right to rely on any misrepresentations.

Whether elements of an action for fraudulent misrepresentation are established is a question for the trier of fact, and its decision will not be disregarded unless it is against the manifest weight of the evidence. (*Kinsey v. Scott* (1984), 124 Ill. App. 3d 329, 335-36, 463 N.E.2d 1359). The

evidence does not establish that Hargrove substantially understated the liabilities against the Woodridge properties. A trial court's findings of fact with respect to intent to deceive when misrepresentations are made will not be reversed unless they are against the manifest weight of the evidence. (*Kinsey*, 124 Ill. App. at 337), and we are unable to make such a finding in this instance. The fact that the liability lists were prepared by Hargrove in January 1981, prior to the March agreement, does not alter the fact that liabilities were understated, and that there was testimony by Heinz and Rosch that Hargrove represented that the list was complete. The question of whether a party had a right to rely in a given set of circumstances is to be answered in light of all facts which he knew or should have known in the exercise of ordinary prudence. (*Kinsey*, 124 Ill. App. at 337-8). The trial court here found that, since Hargrove had almost exclusive charge of paying joint venture liabilities, it was reasonable for Rosch to rely on Hargrove's representations as to the liabilities when he became involved in the joint venture. We will not disturb this finding.

Hargrove next suggests that the damages awarded to Rosch were inappropriate because the court made a number of erroneous factual determinations, improperly excluded evidence relating to damages, and that there was no evidence that Rosch suffered injury. We have considered Hargrove's arguments regarding claimed erroneous factual determinations and error in the admission of evidence by the trial court and find them to be without merit. The amount of the damages is supported by the evidence produced in trial. The court also properly applied the general rule that the measure of damages for fraud is an amount which will compensate the plaintiff for the loss occasioned by the fraud (*Brown v. Broadway Perryville Lumber Co.* (1987), 156 Ill. App. 3d 16, 25, 508

N.E.2d 1170.), and awarded Rosch 50% of the amount the liabilities exceeded disclosure.

Hargrove next contends that the trial court erred in granting summary judgment on count XIII of his third amended complaint which alleged breach of contract and a right to contractual indemnification with regard to the Concordia loan. Rosch responds that summary judgment was proper because the trial court's subsequent finding of fraud is an absolute defense to the March agreement upon which count XIII of Hargrove's third amended complaint was based. Rosch, Gerill, and Heinz argue that the trial court correctly concluded that Hargrove had no claim for contractual indemnification under the March agreement as the court found that Hargrove failed to show any debt or liability asserted against him arising out of the Woodridge venture which required indemnification. Subsequently, apparently in an attempt to establish a loss upon which indemnification could be premised by introducing evidence that he was liable for the Concordia loan by virtue of a title indemnity clause of a title insurance policy, Hargrove requested that the court reconsider its ruling. Hargrove's motion for reconsideration was denied as untimely, and we find no error. Hargrove failed to establish that he was entitled to indemnification for the Concordia loan, and later improperly sought to relitigate the motion for summary judgment.

Hargrove challenges numerous evidentiary rulings by the trial court which he asserts resulted in the exclusion of relevant evidence. A trial court's determination of whether evidence is relevant is largely within its discretion, and its ruling should not be reversed absent a clear abuse of discretion. (*Benson v. Bradford Mutual Fire Insurance Corp.* (1984), 121 Ill. App. 3d 500, 459 N.E.2d 689, *appeal denied; Kyowski v. Burns* (1979), 70 Ill. App. 3d 1009,

1018, 388 N.E.2d 770, *appeal denied.*) We find no abuse of discretion in the exclusion of evidence based on relevancy grounds, nor do we find error in the court's exclusion of documentary evidence offered by Hargrove on the ground that they were untimely, illegible, or incomplete. We further reject Hargrove's assertion that the court erroneously considered the dissolution of the Hargrove corporation in evaluating the credibility of the parties.

Hargrove next contends that the trial court improperly dismissed counts in his second amended complaint. A party who files an amended pleading waives any objection to a trial court's ruling on former complaints. (*Foxcroft Townhome Owners Association v. Hoffman Rosner Corp.* (1983), 96 Ill. 2d 150, 154, 449 N.E.2d 125; *Bundy v. Church League of America* (1984), 125 Ill. App. 3d 800, 804, 466 N.E.2d 681.) Since Hargrove filed a third amended complaint, he has waived his right to object to the trial court's ruling on the second amended complaint.

Hargrove next argues that the trial court erred when it stated that its dismissal of six fraud claims made by Rosch against Hargrove did not preclude an action for accounting against Hargrove by Rosch on *res judicata* or estoppel grounds. We fail to see how this dicta in the trial court's order harms Hargrove. The issue of the *res judicata* or estoppel effect of the judgment on any subsequent action which might be brought by Rosch was not before the court, and its comment would not resolve that issue.

Hargrove contends that the court improperly denied the counterclaim set forth in count V of its third amended complaint which alleged that Rosch, Gerill, and Heinz breached a contractual obligation to repay Hargrove $30,000 which he alleged was utilized to pay outstanding bills on the Woodridge properties after the March agreement. The court in its letter of opinion noted that the

account from which these bills were allegedly paid was under the exclusive control of Hargrove, the lack of supporting documentation for the claim, and found that Hargrove had failed to prove that the money was owed because of payments made for the joint venture on liabilities arising after the March Agreement. Whether a breach of contract has occurred is a question of fact and the judgment of the trier of fact will not be disturbed on appeal unless it is clearly against the manifest weight of the evidence. (*Levan v. Richter* (1987), 152 Ill. App. 3d 1082, 1090, 504 N.E.2d *1373*; *Susman v. Venture* (1983), 114 Ill. App. 3d 668, 674, 449 N.E.2d 143, *appeal denied.*) Here, the court found that Hargrove failed to prove a breach of contract because the evidence did not establish that the $30,000 allegedly due to Hargrove was expended on the joint venture's behalf, and its finding is not contrary to the manifest weight of the evidence.

We next consider Hargrove's assertion that the trial court made erroneous discovery rulings. A court has wide pretrial discovery discretion and its orders regarding discovery will not be disturbed absent a clear abuse of discretion. (*Robinson v. Greely & Hansen* (1983), 114 Ill. App. 3d 720, 731, 449 N.E.2d 250, *appeal denied.*) Hargrove complains of an order which struck all pending discovery motions because some of the motions had been rendered moot. As Gerill and Heinz point out, Hargrove was not harmed by the trial court's attempt to discard mooted discovery questions since Hargrove could have reasserted any motions which were not rendered moot. We further find that the order prohibiting Hargrove's discovery of financial statements, check registers, personal diaries, calendars, journals, and other items belonging to Gerill, Heinz, and Rosch on the ground of irrelevancy was not an abuse of discretion. The denial of Hargrove's motions for supplementary depositions of Rosch and Heinz

because the information sought was covered by other discovery requests was also correct. Finally, we find no merit in Hargrove's contention that the trial court erred in denying the belated motion to enforce a document subpoena on the Federal Savings and Loan Insurance Corporation.

Hargrove suggests that the court's order of February 1, 1984, was invalid because another judge, who later recused himself from the case, had denied Hargrove's first request for a change in venue. We disagree, and find that the judge's initial refusal to recuse himself did not, as Hargrove asserts, void all his subsequent orders in the cause, and render the trial court's reliance on any initial rulings by the prior judge erroneous, as Hargrove failed to establish any actual prejudice on the part of the first judge who later did recuse himself.

Hargrove also asserts that the trial court improperly allowed Rosch to appear as his own attorney because this gave "undue weight to Rosch as a litigate." Hargrove cited no relevant Illinois authority for the proposition that a litigant cannot appear as his own counsel even though represented by an attorney, and we are not inclined to limit an attorney-party participation in litigation absent authority to the contrary.

Finally, Hargrove contends that the trial court erred when it dismissed Hargrove's third-party complaint for contribution against third-party defendants, Gerill and Heinz, pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). We agree.

In the third-party action, Hargrove sought contribution against Gerill and Heinz on theories that they shared fault with Hargrove for intentional (count I) or negligent (count II) misrepresentation to Rosch and were joint tort-feasors under the Contribution Act (Ill. Rev. Stat. 1985, ch. 70,

par. 301, *et seq.*) The trial court in its supplemental opinion of February 13, 1987, dismissed both counts pursuant to section 2-619, finding that there was no right to contribution under the Act for an alleged intentional tort, citing *Bresland v. Ideal Roller & Graphics Co.* (1986), 150 Ill. App. 3d 445, and finding, under the evidence introduced in trial, that as "Gerill and Heinz were not in the business of supplying information for the guidance of others in their business transaction", negligent misrepresentation was not established. See *Marino v. United Bank of Illinois* (1985), 137 Ill. App. 3d 523, 528.

In *Dovin v. Winfield Township* (Docket Nos. 2-86-1151, 2-86-1169, 2d Dist. 1988) ____ Ill. App. 3d ____, ____ (slip op. at 24-27) this court held that an action will lie under the Contribution Act for an intentional tort, and count I of Hargrove's third-party complaint was thus erroneously dismissed. We also conclude that the trial court erred in determining controverted facts and dismissing count II of the complaint pursuant to a section 2-619 motion (see *e.g., Premier Electrical Construction Co. v. La Salle National Bank* (1983), 115 Ill. App. 3d 638, 643.) While it is true that the trial court in its order also purported to "alternatively" find for third-party defendants on the merits under count II, in which a theory of negligent misrepresentation was advanced, we consider only the actual basis upon which that count was dismissed.

Rosch, in his cross-appeal, contends that the trial court erroneously denied prejudgment interest pursuant to statute (Ill. Rev. Stat. 1985, ch, 17, par. 6402) on the amount of the judgment entered against Hargrove. We agree with the court's decision to deny such interest since the understated liabilities upon which the award was based do not constitute "money received to the use of another and retained without the owner's knowledge" or "money with-

held by an unreasonable and vexatious delay of payment" as required by the statute upon which Rosch relied.

We note our agreement with the court's observation that the disputes between these parties have been rendered unduly complex by the parties excessive litigation. Matters concerning the transactions between these parties has been earlier reviewed (*Hargrove v. Gerill Corp.* (1984), 124 Ill. App. 3d 924, 464 N.E.2d 1226.), and it has come to our attention through filings by them in this court that there is currently related litigation pending in the circuit court of Cook County. Although we recognize that attorneys have a responsibility to zealously represent their clients, we abhor unnecessary litigation which delays the judicial process and clogs the judicial system.

Accordingly, the judgment of the circuit court is affirmed in part, reversed in part, and remanded with directions that the circuit court consider the merits of Hargrove's contribution claim against Gerill and Heinz.

Affirmed in part; reversed in part and remanded.

NASH, DUNN, INGLIS, JJ.

APPENDIX D

[FILED FEBRUARY 13, 1987]

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT

No. 82 CH 1032

GERILL CORPORATION, An Illinois Corporation, and GERALD A. HEINZ and JOHN F. ROSCH, individuals,

Plaintiffs and Counter-Defendants

vs

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual, and CONCORDIA FEDERAL SAVINGS AND LOAN, a corporation,

Defendants and Counter-Plaintiffs

and

JACK L. HARGROVE BUILDERS, INC., a Corporation, and JACK L. HARGROVE, an individual,

Third Party Plaintiffs

vs

GERILL CORPORATION, an Illinois Corporation, and GERALD A. HEINZ, an individual,

Third Party Defendants

D2

JUDGMENT ORDER
ON
COUNTS I AND II OF THIRD AMENDED COMPLAINT
OF PLAINTIFF JOHN F. ROSCH
AGAINST DEFENDANTS JACK L. HARGROVE
BUILDERS, INC., AND JACK L. HARGROVE FOR
INTENTIONAL MISREPRESENTATION
AND
COUNT V OF THIRD AMENDED COUNTERCLAIM OF
COUNTERPLAINTIFFS JACK L. HARGROVE BUILDERS,
INC., AND JACK L. HARGROVE AGAINST
COUNTERDEFENDANTS GERILL CORPORATION,
GERALD A. HEINZ AND JOHN F. ROSCH
FOR RECOVERY ON A LOAN
AND
THIRD PARTY COMPLAINT OF THIRD PARTY
PLAINTIFFS JACK L. HARGROVE BUILDERS, INC.
AND JACK L. HARGROVE AGAINST
THIRD PARTY DEFENDANTS
GERILL CORPORATION AND GERALD A. HEINZ
FOR CONTRIBUTION

Counts I and II of Third Amended Complaint of plaintiff JOHN F. ROSCH against defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE for Intentional Misrepresentation, and Count V of Third Amended Counterclaim of counterplaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against counterdefendants GERILL CORPORATION, GERALD A. HEINZ and JOHN F. ROSCH for recovery on a loan and third party complaint of third party plaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against third party defendants GERILL CORPORATION and GERALD A. HEINZ for contribution having come on for trial, the Court having issued opinion dated December 8, 1986, having considered counsels' proposed judgment orders, and objections, having heard counsels' final arguments on third party claim for contribution,

THE COURT FINDS as to Counts I and II of Third Amended Complaint of plaintiff JOHN F. ROSCH against Defendants JACK L. HARGROVE BUILDERS, INC. and JACK L. HARGROVE for Intentional Misrepresentation as follows:

(1) The defendants JACK L. HARGROVE BUILDERS, INC. and JACK L. HARGROVE intentionally misrepresented liabilities of joint venture in inducing the plaintiff JOHN F. ROSCH to enter into written agreement of March 1, 1981.

(2) The plaintiff JOHN F. ROSCH is entitled to compensatory damages prayed for in Count I but not to punitive damages prayed for in Count II.

(3) The plaintiff JOHN F. ROSCH is entitled to recover 50% of the following amounts as compensatory damages:

(Exhibit A, attached hereto and incorporated herein by reference, sets out the basis of calculating the following items.)

Air Aid Heating & Cooling	$ 9,508.00
Alsterda Cartage & Construction Co.	121,698.50
Burke Engineering	8,607.93
Dahl Law Suit	8,000.00
Jack Flanigan Marketing	6,300.00
Lisle Electric, Inc.	28,311.76
Mark Plumbing Co.	10.750.00
W. G. Meneou Cabinet Co.	6.576.00
Ready Paving & Construction Co.	17,896.45
Village of Woodridge and County of DuPage	79,950.72
Total	$297,599.39

(4) The plaintiff JOHN F. ROSCH is not entitled to recover compensatory damages on remaining claims on the ground that plaintiff's reliance on defendants' failure to

disclose liabilities was not justified as is required to be proven to recover under the tort of intentional misrepresentation, and March contract payments were future events on 3-1-81. Nothing in this order should operate as *res judicata* or estoppel or otherwise preclude plaintiff from seeking recovery in accounting or in any action other than intentional misrepresentation on the following disallowed claims:

Real Estate Taxes	$118,773.81
Tax Escrows	24,520.99
March Contract Payments	99,497.71
Concordia Mortgage	396,000.00
Renter's Deposits	18,969.00
First Natl. Bank of Oak Lawn	290,043.45

IT IS HEREBY ORDERED that on Count I of Third Amended Complaint of plaintiff JOHN F. ROSCH for Intentional Misrepresentation judgment enters for plaintiff JOHN F. ROSCH against defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE in the amount of $148,799.69 plus costs. No interest is awarded.

IT IS FURTHER ORDERED that on Count II of Third Amended Complaint of plaintiff JOHN F. ROSCH for Intentional Misrepresentation judgment enters for defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE and against plaintiff JOHN F. ROSCH.

IT IS FURTHER ORDERED that on Count V of Third Amended Counterclaim of counterplaintiff JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against counterdefendants GERILL CORPORATION, GERALD A. HEINZ and JOHN F. ROSCH for Recovery of a Loan, judgment enters for counterdefendants GERILL CORPORATION, GERALD A. HEINZ

and JOHN F. ROSCH and against counterplaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE.

IT IS FURTHER ORDERED that on Third Party Complaint of third party plaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against third party defendants GERILL CORPORATION and GERALD A. HEINZ for Contribution the section 2-619 motion of GERILL CORPORATION and GERALD A. HEINZ is granted and this cause is dismissed with prejudice.

IT IS FURTHER ORDERED that opinion dated December 8, 1986, and Supplemental Opinion dated February 13, 1987, copy of each attached, are incorporated herein by reference.

THE COURT SPECIALLY FINDS that there is no just reason to delay enforcement or appeal of this judgment order.

ENTER: /s/ Helen C. Kinney
Circuit Judge

DATED: February 13, 1987

EXHIBIT A

Air Aid Heating & Cooling

$30,908.00 disclosed/ $40,416.00 proven/ $9,508.00 difference

Alsterda Cartage & Construction Co.

$1,274.50 disclosed/ $122,973.00 proven/ $121,698.50 difference

Burke Engineering

$55,871.67 disclosed/ $64,479.60 proven/ $8,607.93 difference

Dahl Law Suit

-0- disclosed/ $8,000 proven/ $8,000 difference

Jack Flanigan Marketing

-0- disclosed/ $6,300 proven/ $6,300 difference

Lisle Electric, Inc.

$19,282.30 disclosed, but plaintiff's higher figure of $19,929.00 accepted/ $48,241.66 proven/ $28,311.76 difference

Mark Plumbing Co.

$55,935.00 disclosed/ $66,685.00 proven/ $10,750.00 difference

W. G. Meneou Cabinet Co.

-0- disclosed/ $6,576.00 proven/ $6,576.00 difference

Ready Paving & Construction Co.

$22,190.47 disclosed/ $40,086.92 proven/ $17,896.45 difference

Village of Woodridge and County of Du Page

-0- disclosed/ $79,950.75 proven/ $79,950.75 difference

State of Illinois
County of Du Page—ss

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT

No. 82 CH 1032

GERILL CORPORATION, an Illinois corporation, GERALD A. HEINZ, and JOHN F. ROSCH, individuals,

Plaintiffs and Counter-defendants,

v.

JACK L. HARGROVE BUILDERS, INC., a corporation, JACK L. HARGROVE, an individual, and CONCORDIA FEDERAL SAVINGS AND LOAN, a corporation,

Defendants and Counter-plaintiffs.

LETTER OF OPINION

This letter is written to instruct counsel on drafting a judgment order and to set out the decision rationale. The order is to provide that this letter of opinion is incorporated into the order which is to be presented January 23, 1987, at 2:00 P.M. with an advance copy served on other counsel.

COMPLAINT OF ROSCH, COUNTS I AND II, AGAINST HARGROVE FOR INTENTIONAL MISREPRESENTATION

There are conflicts in the testimony of various witnesses. I find the testimony of Mr. Heinz, Mr. Rosch, and Mr. Gilmartin credible and the testimony of Mr. Hargrove and Miss Peloza incredible where there is conflict on important points. I specifically find truthful the testimony of Mr. Rosch that before signing the agreement and paying the $200,000.00 he did ask Mr. Hargrove if all liabilities were disclosed and that Mr. Hargrove responded that they were.

Two elements of the tort of intentional misrepresentation deserve particular consideration as they apply to this case.

The first is that a plaintiff's reliance on a misrepresentation must be justified. See *Central States Joint Board v. Continental Assurance Company*, 117 Ill. App. 3d 600 at 606 and 607. "In determining whether reliance was reasonable, all of the facts which plaintiff had actual knowledge of, as well as all of those it might have learned if it had used ordinary prudence, must be taken into account; if ample opportunity existed to discover the truth, then reliance is not justified." *National Republic Bank v. National Homes Construction Corp.*, 63 Ill. App. 3d 920 at 925.

The financial sophistication of Mr. Hargrove is at least equal to that of Mr. Rosch. He should not be considered even slightly disadvantaged. As plaintiff's counsel expressed it, Mr. Hargrove does know how to count.

Everyone understood this was a high stakes transaction involving chance of substantial profit or loss. The flavor of it is reflected in the subsequent approval of Mr.

Heinz and Mr. Rosch, without consideration, to tack on a $71,000.00 liability that Mr. Hargrove had failed to disclose.

The second element of the tort in question that deserves discussion in its application to this case is that defendant must make the misrepresentation knowing it is false or with reckless disregard whether it is true or false. The shadings of this element have been collected in *Duhl v. Nash Realty Inc.*, 102 Ill. App. 3d 483 at 491 in the following passage:

> "A party is considered to intend the necessary consequences of his own acts. (*Posner v. Davis* (1979), 76 Ill. App. 3d 638, 395 N.E.2d 133.) Accordingly, one who knowingly makes a false statement to another who relies thereon is guilty of fraud regardless of the defendant's motive and the plaintiff is not required to prove an express fraudulent intent. (*Case v. Ayers* (1872), 65 Ill. 142; *Broberg v. Mann* (1965), 66 Ill. App. 2d 134, 213 N.E.2d 89; *John v. Farrell Co. v. Nathanson* (1900), 99 Ill. App. 185.) And knowledge of wrongdoing sufficient to support an action for fraud exists where representations which are in fact false are made in reckless disregard of their truth or falsity. (*Hurley v. Frontier Ford Motors, Inc.* (1973), 12 Ill. App. 3d 905, 299 N.E.2d 387, appeal denied (1973), 12 Ill. App. 3d 905, 299 N.E.2d 387, appeal denied (1973), 54 Ill. 2d 597; *Solazzi v. Casola* (1952), 345 Ill. App. 407, 103 N.E.2d 164 (abstract); *Tone v. Halsey Stuart & Co., Inc.* (1936), 286 Ill. App. 169, 3 N.E.2d 142; *Snively v. Meixsell* (1901), 97 Ill. App. 365.) Likewise statements made in culpable ignorance of their truth or falsity are fraudulent. (*Oltner v. Zamora* (1981), 94 Ill. App. 3d 651, 418 N.E.2d 506.) Indeed, it has been held that good faith is no defense where the fraud and deceit practiced consist, as here, of making false statements of fact as to the knowledge of the speaker. (*Brennan v. Perselli* (1932), 266 Ill. App. 441, *aff'd* (1933), 353 Ill.

> 630, 187 N.E. 820; *National Bank v. Hamilton* (1916), 202 Ill. App. 516.) As the Illinois Supreme Court remarked in *Brennan v. Persselli* (1933), 353 Ill. 630, 635, 187 N.E. 820, 822: 'it is immaterial whether a party misrepresenting a material fact knows it to be false or makes the assertion of the fact without knowing it to be true, for the affirmation of what one does not know to be true is unjustifiable, and if another act upon the faith of it, he who induced the action must suffer, and not the other.' "

One of the items for which plaintiff claims damages due to an undisclosed charge upon which the venture property is the fee for building permits. Defendant's counsel has argued that as the evidence shows Mr. Hargrove first said the building permits had been obtained and later admitted they had not, he could not have engaged in intentional misrepresentation as he did not "know." The argument is invalid. Ignorance of the facts or making a representation based on an inadequate "accordion file" or a "chaotic file", if indeed that occurred, is the legal equivalent of "knowledge" that the incomplete disclosure of liabilities was false.

Considering that Mr. Rosch was coming into a joint venture that had been conducted for years without any written agreement, with Mr. Hargrove having almost autonomous charge of authorizing payment for construction work and other services rendered to the venture, Mr. Rosch was justified in relying upon Mr. Hargrove's representation as to this type of liability. These kinds of liabilities fluctuate and are difficult to verify at any point in time, let alone to identify at all.

Consequently, Mr. Rosch will have judgment in Count I for one-half (based on his 50% interest in the venture) of the amount by which liabilities for payment to the following persons or entities exceeded disclosure by Mr.

Hargrove: Air Aid Heating; Burke Engineering; Lisle Electric; Mark Plumbing; Meneou Cabinet; Village of Woodridge; Dahl law suit; Jack Flanigan Marketing; Ready Paving; and Alsterda. Duplicate billings or rebillings are not to be included.

The remaining items (See plaintiff's Exhibit 6) are not allowed even though Mr. Hargrove clearly misrepresented them. Evidence offered by Hargrove to show the Concordia mortgage was lumped with the Unity loan is not believable. While it seems incongruous to reward misrepresentation with prevailing in a dispute, these claims must be refused solely on the ground that reliance was neither reasonable nor prudent. Mortgages are recorded, lending institutions have records, taxes accrue, and existence and turnover of tax escrow accounts could have been required. Any misappropriation of March collections was a future event at the time the agreement was signed. This element of justified reliance is unique to the tort of intentional misrepresentation and does not control or preclude recovery of disallowed items in accounting or otherwise.

Punitive damages are not appropriate and judgment on Count II will be entered for Hargrove.

HARGROVE COUNTERCLAIM FOR $30,000.00 BALANCE ON LOAN TO GERRIL / HEINZ / ROSCH VENTURE

The root of the claim is that $50,000.00 was deposited by lender Hargrove into an account controlled exclusively by Hargrove. None of the claimed borrowers, Gerrill, Heinz, or Rosch, had any signatory powers in the account.

On February 28, 1981, and immediately before deposit of $50,000.00 on March 2, 1981, the account had a negative balance in excess of $17,000.00. Hargrove acknowledges

withdrawal of $10,000.00 upon each of two subsequent occasions for benefit of Hargrove.

There is a noticeable lack of supporting documentation, and Miss Peloza's testimony has been impeached in other areas. Hargrove fails to sustain the burden of proof that money is owed because of payments made for the Rosch/Heinz venture on liabilities arising after March 1, 1981.

RECONSIDERATION OF SUMMARY JUDGMENT

Reconsideration of Summary Judgment against Hargrove on Hargrove's Count XIII will be denied.

Hargrove had ample time to gather evidence and prepare for the September 26, 1986, hearing on the motion for summary judgment.

The question at issue was whether Hargrove Builders or Hargrove had any liability on a $352,000 Concordia mortgage undertaken by Beverly State Bank as Trustee and had made any payments on it for which counterdefendants had failed to indemnify them. Any payments made would be a matter particularly within the knowledge of Hargrove.

Yet Hargrove submitted nothing raising a question of fact on the issue either in response to the motion or in support of Hargrove's cross motion. Hargrove now fails to show that by exercising even a pedestrian level of diligence it could not have submitted whatever else it desired to put before the court on the issue at the time the motion was heard.

CONCLUSION

The conduct of this litigation in behalf of Hargrove has sometimes tended to make it unnecessarily complex. The trial was vexatiously lengthened by Hargrove's repeated efforts, after ruling had been obtained and a record sufficient for appeal made, to introduce testimony and exhibits deemed irrelevant.

After years of dissolution, the Hargrove corporation was revived a few weeks before trial, with the request that Miss Peloza, as a corporate officer, remain in the courtroom throughout the trial from which witnesses were excluded. In a conference with counsel following an objection of privilege, it was acknowledged that Miss Peloza had appeared for deposition as a witness with her own attorney, Mr. Allen Brown. This piece of posturing in the management of Hargrove's case did not enhance the credibility of Miss Peloza's testimony.

The discovery process was difficult, requiring the intervention of the court to conclude Miss Peloza's deposition and to resolve repetitious demands. Yet Hargrove's counsel stated inaccurately that the court had denied Hargrove's motion to redepose Mr. Rosch on the ground an earlier assigned judge had so ordered. Order entered April 3, 1986, provides in pertinent part the following:

> "6) Motion of Hargrove to redepose John Rosch is denied on the ground that Hargrove and Rosch agree that the attached pending Supplemental Request to Produce (Exhibit A) and previously filed Schedule of Documents of Rosch (Exhibit B) cover the inquiry. The ruling of the court on specific items or agreement of Rosch and Hargrove on specific items are reflected on the face of Exhibits A and B and these exhibits are incorporated herein."

This suit has many parts, some severed for manageability, with an accounting action of Gerril [sic] and Heinz and a law count of Hargrove still pending. In the interests of bringing to a conclusion those segments of it which have been adjudicated, you are to include in the order that the judgments are final and that the court finds no just reason to delay enforcement or appeal.

/s/ Helen C. Kinney
Helen C. Kinney,
Circuit Judge

Dated: December 18, 1986

[1]* # APPENDIX E

[FILED JULY 13, 1989]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, C. GARY SPANIAK, NORBERT MURRAY and DAVID R. DAVID

No. 89 CR 592
Violations: Title 18, United States Code, Sections 2, 371, 657, 1341, 1343, and 1962(d)

COUNT ONE

The SPECIAL APRIL 1987 GRAND JURY charges:

1. At times material to this Indictment:

* Numbers in brackets refer to the original typescript page numbers of the Indictment.

(a) Glen Ellyn Savings and Loan Association (hereinafter Glen Ellyn Savings) was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in Glen Ellyn, Illinois. The deposits of Glen Ellyn Savings were insured by the Federal Savings and Loan Insurance Corporation (hereinafter FSLIC).

(b) First Savings of South Beloit was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in South Beloit, Illinois. The deposits of First Savings of South Beloit were insured by the FSLIC.

(c) The American Bank of Alma (hereinafter Bank of Alma) was a bank chartered by the State of Wisconsin that maintained its principal place of business in Alma, Wisconsin. The deposits of the Bank of Alma were insured by the Federal Deposit Insurance Corporation (hereinafter FDIC).

(d) Defendant JOHN FRANKLIN ROSCH was the President and chief operating officer of Glen Ellyn Savings. Additionally, he was an attorney who performed legal services on behalf of Glen Ellyn Savings.

[2] (e) Defendant TIMOTHY HEUER was the President, chief operating officer, and sole shareholder of First Savings of South Beloit.

(f) Defendant ALAN KIRCHNER was the President, chief operating officer, and sole shareholder of the Bank of Alma.

(g) Defendant JAMES REAGIN was a businessman and real estate developer based in Dallas, Texas.

(h) C. Gary Spaniak and defendant NORBERT MURRAY were partners in Shopping Center Development

Company of America (hereinafter Shopping Center Development), which was a real estate development firm that developed shopping centers in many states.

(i) The FSLIC was a regulatory agency of the United States government, which insured the deposits of its member institutions and which was directed by the Federal Home Loan Bank Board (hereinafter FHLBB).

(j) The FHLBB was a regulatory agency of the United States government that had regulatory authority to ensure, among other things, that each FSLIC-insured institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that the records of the institution were properly and accurately maintained.

(k) The FDIC was a regulatory authority of the United States government that had supervisory authority over FDIC-insured banks and financial institutions and their affiliates and subsidiaries. The FDIC had authority to ensure, among other things, that each institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that records of the institution were properly and accurately maintained.

[3] (l) Defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER and ALAN KIRCHNER were required to follow all federal and state laws and regulations regarding the operations of financial institutions, including: a) regulations that prohibited each institution from making loans to officers and other persons affiliated with the institution without full disclosure to the institution's Board of Directors; b) regulations that limited the amount of

funds that could be loaned to one borrower; and c) regulations that required each institution to keep accurate and complete records of all business transactions of the institution.

—*THE ENTERPRISE*

(m) Defendant JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, and NORBERT MURRAY, and C. Gary Spaniak, Glen Ellyn Savings, First Savings of South Beloit, the Bank of Alma, and Shopping Center Development formed and were an association-in-fact and constituted an enterprise as that term is defined in Title 18, United States Code, Section 1961(4), the activities of which affected interstate commerce. That enterprise was on-going and had a structure that maintained operations directed towards achievement of its economic and other goals.

RELEVANT STATUTES

(n) There were in force and effect the following criminal statutes of the United States, involving mail fraud and wire fraud, each violation of which was an act of racketeering, and which stated, in relevant part, as follows:

> *Title 18, United States Code, Section 1341* (mail fraud):
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any [4] post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or

thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, [shall be guilty of an offense].

Title 18, United States Code, Section 1343 (wire fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, [shall be guilty of an offense].

THE CONSPIRACY

2. From in or about early 1984 and continuing through 1986, at Glen Ellyn and Chicago in the Northern District of Illinois, Eastern Division, and South Beloit in the Northern District of Illinois, Western Division, and elsewhere,

JOHN FRANKLIN ROSCH,
JAMES REAGIN,
TIMOTHY HEUER,
ALAN KIRCHNER, and
NORBERT MURRAY,

defendants herein, who were persons associated with an enterprise that engaged in and the activities of which affected interstate commerce, namely, the enterprise described in subparagraph 1 (m) above, knowingly conspired and agreed with each other, with C. Gary Spaniak, and with others known and unknown to the Grand Jury, to conduct and participate, directly and indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as that term is described in Title 18,

United States Code, Section 1961, said racketeering activity consisting of multiple acts of wire fraud, in violation of Title 18, United States Code, Section 1343, and mail fraud, in violation of Title 18, United States Code, Section 1341, which acts are further described below.

[5] 3. It was further part of the conspiracy that defendants JAMES REAGIN and NORBERT MURRAY, and C. Gary Spaniak, all of whom operated businesses and participated in business ventures that required large amounts of financing, obtained substantial control over the lending activities of federally insured financial institutions by giving loans, money, and property, and by promising future loans, money and property to defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER and ALAN KIRCHNER.

4. It was further part of the conspiracy that, in exchange for loans, money, and property, and the expectation of future loans, money, and property, defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER granted loans to each other and to defendants JAMES REAGIN and NORBERT MURRAY, and C. Gary Spaniak, and their nominees, trusts, corporations and partnerships, which loans violated federal and state laws and regulations governing financial institutions.

5. It was further part of the conspiracy that defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER did falsify, misrepresent, and conceal material matters regarding lending from the Boards of Directors and officers of their respective institutions.

6. It was further part of the conspiracy that defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER did falsify, misrepresent, and conceal material matters regarding lending from federal and state bank examiners.

7. It was part of the conspiracy that defendants JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, and NORBERT MURRAY, and C. Gary Spaniak, and their co-conspirators agreed that the enterprise would be conducted through the commission of two or more acts of racketeering activity, namely acts of mail fraud and wire fraud, which acts would constitute a pattern of racketeering activity in the conduct of the affairs of the enterprise.

* * * * *

[63] *COUNT TWENTY-NINE*

The SPECIAL APRIL 1987 GRAND JURY further charges:

1. At times material to this indictment:

(a) Glen Ellyn Savings and Loan Association (hereinafter Glen Ellyn Savings) was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in Glen Ellyn, Illinois. The deposits of Glen Ellyn Savings were insured by the Federal Savings and Loan Insurance Corporation (hereinafter FSLIC).

(b) Defendant JOHN FRANKLIN ROSCH was the President and chief operating officer of Glen Ellyn Savings. Additionally, he was an attorney who performed legal services on behalf of Glen Ellyn Savings.

(c) Michael Pietrzak was an associate of defendant JOHN FRANKLIN ROSCH.

(d) The FSLIC was an agency of the United States, which insured the deposits of its member institutions and which was directed by the Federal Home Loan Bank Board (hereinafter FHLBB).

(e) The FHLBB was a regulatory agency of the United States government that had regulatory authority to en-

sure, among other things, that each FSLIC-insured institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that the records of the institution were properly and accurately maintained.

(f) Defendant JOHN FRANKLIN ROSCH, was required to follow all federal and state laws and regulations regarding the operations of financial institutions, including: a) regulations that prohibited each institution from making loans to officers and other persons affiliated with the institution without full disclosure to the institution's Board of Directors; b) regulations that limited the amount of funds that [64] could be loaned to one borrower; and c) regulations that required each institution to keep accurate and complete records of all business transactions of the institution.

2. Pursuant to federal and state laws and regulations in force at times relevant to this Indictment, an officer of an FSLIC-insured institution seeking commercial credit from the institution in excess of $10,000 was required to fully disclose to the Board of Directors his or her interest in the proposed loan. The officer could not participate in the decision to grant the loan. Approval could be granted only by a majority of disinterested directors, by duly adopted resolution.

3. From at least 1981 until approximately 1987, at Glen Ellyn and elsewhere in the Northern District of Illinois, Eastern Division,

JOHN FRANKLIN ROSCH,

defendant herein, with Michael Pietrzak and others known and unknown to the Grand Jury, devised, intended to devise, and participated in a scheme and artifice to de-

fraud and to obtain money and property from Glen Ellyn Savings by false and fraudulent pretenses, representations and promises, which scheme is further described as follows.

4. It was part of the scheme that defendant JOHN FRANKLIN ROSCH, while he was President of Glen Ellyn Savings held financial interests in a number of real estate development projects and, in violation of state and federal banking regulations, caused Glen Ellyn Savings to grant loans for these projects while concealing from the Board of Directors his financial interests in the projects.

$840,000 Loan for Woodridge Real Estate Projects

5. It was further part of the scheme that in approximately March 1981, a certain individual, who had held a 50% interest in six real estate development projects in Woodridge, Illinois, sold all his interest in the projects to defendant JOHN FRANKLIN ROSCH, who thereby became an equal partner in these projects with another individual (hereinafter referred to as "partner").

6. It was further part of the scheme that on or about May 12, 1981, the Board of Directors of Glen Ellyn Savings approved a proposed loan in the amount of $840,000 [65] for several portions of the Woodridge projects in which defendant JOHN FRANKLIN ROSCH had a 50% interest. Defendant JOHN FRANKLIN ROSCH concealed his interest from the Board of Directors, and the proposed loan was presented to the Board of Directors in the name of the individual from whom defendant JOHN FRANKLIN ROSCH had purchased his interest, and who was no longer involved in the projects.

7. It was further part of the scheme that in March 1982, after condominiums were built in one of the Wood-

ridge projects and over one hundred land contracts were sold to prospective purchasers of the condominium units, defendant JOHN FRANKLIN ROSCH caused Glen Ellyn Savings to purchase the land contracts. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors the fact that he held a 50% interest in these contracts.

8. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH and his partner gained approximately $500,000 from the sale of the land contracts to Glen Ellyn Savings, many of which land contracts later defaulted, resulting in a loss to Glen Ellyn Savings of approximately $367,000.

Loans for Vernon Hills Properties

9. It was further part of the scheme that, in January 1981, when his partner had reached his lending limit at Glen Ellyn Savings, defendant JOHN FRANKLIN ROSCH recruited Michael Pietrzak to apply to Glen Ellyn Savings for loans totalling approximately $1,102,500 for the purchase of real estate in Vernon Hills, Illinois, which property was placed in a trust at DuPage County Bank.

10. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH caused a false financial statement to be submitted to Glen Ellyn Savings on behalf of Michael Pietrzak, in which the assets and income of Michael Pietrzak were substantially overstated.

11. It was further part of the scheme that, on or about January 14, 1981, defendant JOHN FRANKLIN ROSCH and his partner agreed to pay approximately [66] $45,000 to Michael Pietrzak, who, in return, assigned the beneficial interest in the trust to defendant JOHN FRANKLIN ROSCH and his partner.

12. It was further part of the scheme that also on January 14, 1981, Michael Pietrzak entered into a "hold harmless" agreement with defendant JOHN FRANKLIN ROSCH and his partner whereby Michael Pietrzak would not be held responsible for the repayment of the loans from Glen Ellyn Savings that would finance the purchase of the Vernon Hills real estate.

13. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors of Glen Ellyn Savings both the assignment of the trust and the "hold harmless" agreement, and he did not place either document in the loan files.

14. It was further part of the scheme that on or about March 20, 1984, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve two additional loans, each for $480,000, to develop the Vernon Hills real estate. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors that he held a 50% interest in the development of this real estate.

15. It was further part of the scheme that on or about January 25, 1985, three additional loans, each for approximately $240,000, were made by Glen Ellyn Savings to develop the Vernon Hills real estate. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors that he held a 50% interest in the development of this real estate.

16. It was further part of the scheme that after the Vernon Hills real estate development project was completed, defendant JOHN FRANKLIN ROSCH and his partner made a profit. As his share of the profit, defendant JOHN FRANKLIN ROSCH received a check for $50,000 on September 26, 1986, and a check for $4,500 on September 18, 1987.

[67] *Loans for the Piers Project*

17. It was further part of the scheme that on or about July 20, 1982, in connection with a real estate development called the "Piers" project, which was one of the Woodridge projects in which defendant JOHN FRANKLIN ROSCH held a 50% interest, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve two loans, each for $350,000, which had been disbursed on June 10, 1982. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his interest in the Piers project.

18. It was further part of the scheme that on or about September 23, 1983, defendant JOHN FRANKLIN ROSCH caused two loans, each for approximately $350,000, to be made by Glen Ellyn Savings to develop the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

19. It was further part of the scheme that on or about November 15, 1983, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve another loan for approximately $350,000 which had been disbursed on September 23, 1983, and which was to be used in developing the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

20. It was further part of the scheme that on or about March 25, 1985, defendant JOHN FRANKLIN ROSCH caused two loans, each for approximately $700,000, to be made by Glen Ellyn Savings for the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

21. It was further part of the scheme that the completion of the Piers project resulted in a profit to defendant JOHN FRANKLIN ROSCH and his partner. As a portion of his share of the profit, defendant JOHN FRANKLIN ROSCH received a $4,000 check [68] on or about April 10, 1986, a $14,063 check on or about July 25, 1986, and a $9,000 check on or about September 18, 1987.

22. On or about April 10, 1986, at Westmont, in the Northern District of Illinois, Eastern Division,

JOHN FRANKLIN ROSCH,

defendant herein, for the purpose of executing the aforesaid scheme and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, an envelope containing a check in the amount of $4,000, that envelope being addressed to John Franklin Rosch, Glen Ellyn Savings and Loan, 497 Main Street, Glen Ellyn, Illinois 60137;

In violation of Title 18, United States Code, Section 1341.

* * * * *

A TRUE BILL:

/s/ Joseph Y. Grossi
Foreperson

/s/ Anton R. Valukas
United States Attorney

89-348

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC.,
and
JACK L. HARGROVE

Petitioners,

vs.

JOHN F. ROSCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. McGARRY
JOHN T. McGARRY, LTD.
1609 East 53rd Street
Chicago, IL 60615
(312) 288-2758

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JURISDICTION

Although Petitioners claim jurisdiction under 28 U.S.C. #1257(a), they fail to frame a substantial federal question which was raised or decided by the Illinois Supreme Court. To the contrary, Petitioner complains about state substantive law which, though properly applied, contends resulted in a denial of *"due process."*

The basis for their arguments are that (1) the exclusion of irrelevant evidence (ie., post occurrence events) somehow deprived them of due process and (2) the exclusion of evidence on the question of damages somehow also deprived the petitioner of due process of law in violation of the Fourteenth Amendment.

The petitioner, Hargrove, was indisputably proven to be the perpetrator of the tort of fraudulent misrepresentation in conjunction with the sale of his half-interest in an on-going partnership to respondent, Rosch, has at the twelfth hour, attempted to fabricate federal constitutional issues.

As part of the sale and transfer of Hargrove's interest in the partnership, the trial court found that Hargrove had misrepresented (understated) more than $1 million dollars in partnership debts[1] but this amount was reduced to a judgment of $148,977.58 against Hargrove.

Both the Appellate Court of Illinois, 2nd District, (Order Pursuant to Supreme Court Rule 23, Appellate Court of Illinois, Second Judicial District, March 7, 1988 [opinion set

[1] After a 17 day bench trial, the trial judge found that Hargrove had intentionally misrepresented the liabilities of the joint venture (of which he was the managing partner) in an amount over $1.1 million dollars, but the court disallowed a substantial portion of the misrepresented debts because the plaintiff (Rosch) did not show *"justifiable reliance."* Under Illinois law, one of the requisite elements which plaintiff must prove to recover damages for the intentional tort of fraudulent misrepresentation is *justifiable reliance.*

forth in its entirety in Petitioners' Appendix C]) and the Supreme Court of Illinois, 128 Ill.2d 179, 538 N.E.2d 530 (1989) affirmed the judgment as to the plaintiff, Rosch, *in toto*.

Only after the Supreme Court of Illinois rendered its opinion, *supra*, did the "*constitutional issues*" appear for the first time (ie., in Petitioners' Petition for Rehearing). Words like "*due process*" or "*deprivation of [his] constitutional rights*" appeared only after the Illinois Supreme Court had ruled against Hargrove on all matters.

To further "bootstrap" Petitioners' federal questions, they have attempted to advance arguments predicated upon incorrect (or misstated) factual matters or upon evidence that was specifically excluded.

Accordingly, the Petition should be denied because the appeal does not present a substantial Federal question, or in the alternative, for failure of Respondent to properly (and timely) raise a Federal question in the State Court so as to vest this Court with jurisdiction.

RESPONDENT'S STATEMENT OF THE CASE.

This entire case was originally predicated upon a simple, two-page written agreement which was executed on or about March 1, 1981.[2] In that agreement, Hargrove sold his one-half interest in a partnership to Rosch for $200,000 and Rosch's assumption of the debts of the partnership as represented to him by Hargrove. As part of the "inducement" for Rosch to

[2] This relatively innocuous appearing document has, so far, given rise to 10,000 pages of pleadings, 8,000 pages of transcripts, has also been the basis for four (4) separate law suits, two (2) appeals to the Illinois Appellate Court, one (1) Petition for a Writ of Mandamus and one (1) appeal to the Illinois Supreme Court (and has produced litigation that has been in the Court system for approximately 7 years). These factors are germane when Hargrove's argument that he was deprived of due process and access to the Court's is considered. *Infra*.

purchase Hargrove's interest, the Petitioner provided Rosch with a written schedule of debts and liabilities of the partnership. These lists were prepared by Hargrove from his own records. At the closing, Hargrove reaffirmed the correctness and accuracy of the lists. C-7836; C-8933-34. During the time that Hargrove was an owner and partner, he had *"virtually autonomous control"* of all of the books and records of the partnership.

As was later proven at the trial, Hargrove understated the debts by more than $1 million — however the Court did not award this entire amount as damages (because of the doctrine of *"justifiable reliance"*).

The understated debts consisted of amounts due various sub-contractors and tradesmen. All of the Illinois Courts (ie., Circuit Court, Appellate Court and Supreme Court) applied the substantive rule of law commonly known as the *benefit-of-the-bargain* rule in computing damages to which this respondent was entitled to recover. Under the *benefit-of-the-bargain* rule (which, according to Illinois law) governs the damage computation in fraudulent misrepresentation cases and "damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true." *Gerill vs. Hargrove*, 128 Ill. 2d 179, 538 N.E.2d 530 (1989); *Kinsey vs. Scott*, 124 Ill. App. 3d 329, 463 N.E. 2d 1259.

The petitioners herein, for the first time, claim that because they were not allowed to present evidence of their "theory of defense" (which consisted of events occurring subsequent to the March 1, 1981 agreement) they were denied due process.

HARGROVE'S THEORY OF DEFENSE IS PREDICATED UPON IRRELEVANT, IMMATERIAL AND INCORRECT DATA.

From the inception of this litigation, one of the tact's employed by Petitioners' counsel was to "attack" everybody who in any way disagreed with their "*theory of the case.*" A few examples of such tactics can be found in the trial court where one of the trial judges accused petitioners' counsel of unprofessional conduct:[3] The following is an exact quote from the Honorable John Teschner, Judge of the Circuit Court:

> "The reason I am tempted to is what I consider as some of the most unprofessional conduct I have ever seen displayed.
>
> * * * Making bare allegations against a Judge which are not borne out in fact, in an attempt to effectuate a change of venue . . . this is a continual baiting and trying of a judge.
>
> I don't mind being tried, but I do mind unprofessional conduct. * * *"

This "conduct" was also noted by the Honorable Judge Helen Kinney in her "Letter of Opinion:"

> "The conduct of this litigation in behalf of Hargrove has sometimes tended to make it unnecessarily complex. The trial was vexatiously lengthened by Hargrove's repeated efforts, after ruling had been obtained and a record sufficient for appeal made, to introduce testimony and exhibits deemed irrelevant." C-5544. (See: Petitioners' Appendix D13.)

The Illinois Appellate Court also commented upon the fact that the "disputes between these parties have been rendered unduly complex by the parties excessive litigation." (See: Petitioners' Appendix C12.)

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[3] Transcript of Proceedings, October 1, 1984 Appellate Court Record, Supplemental Appendix in Support of Brief, Appendix I.

The petitioners are again attempting to argue that they should have been permitted to inquire into events that occurred after March 1, 1981 and that all of the Courts that have been exposed to this case have "erred" by ruling against them. This argument is totally inconsistent with the position adopted by the petitioners' counsel in the trial court, to-wit:

> At C-7805: Mr. King objected to the introduction of evidence because it was "beyond the relevant time frame."
>
> At C-7841: Mr. King objected to the introduction of oral testimony as to what occurred on March 2nd or 3rd (1981) on the grounds that it was irrelevant. "If we are talking about a breakoff date of March 1, (1981) anything that happened after is irrelevant, then none of this can be relevant."

By way of digression, it should be called to this Court's attention that shortly after the trial commenced, the respondent presented a motion in liminue (which was to be used in the event of a jury trial) and this motion was argued on October 6th (C-8263-8276) and an order was entered thereon C-5132. It was summarized best by Mr. Braun (attorney for Gerill Corporation):

> "[The appellants failed to show to the trial court a] rational, reasonable, coherent argument why going into the issue(s) of Mr. Rosch's involvement with the FSLIC . . . or the contractor's statements has anything to do with this case . . . other than to 'sling mud'." C-8268

At the time of the trial, respondent's relationship with the Federal Government was well known to Hargrove's counsel. They had "catalogued" every known event in which the respondent was involved.

From the inception of this litigation, Hargrove has attempted to "side step" the issue of his commission of fraudulent misrepresentation by attacking and placing the respondent on the defensive. This is further illustrated by Hargrove making reference to portions of the indictment of Rosch (*United States of America v. John Franklin Rosch, et. al.*, No. 89 CR 592 (N.D. Ill. filed July 13, 1989). Since Hargrove

was kind enough to enclose a copy of portions of the indictment with his petition (Appendix E), it must be reviewed and commented upon hereon so that this Court is fully aware of the real motive(s) for its inclusion. A review of the indictment clearly reveals that Counts I through XXVIII have nothing whatsoever to do with any matter before this Court (other than to note that much of the matter has already been litigated in the civil courts, *supra*).

Count XXIX of the indictment charges, in part, as follows:

> "#5. . . . [Hargrove], who held a 50% interest in . . . real estate development projects . . . sold all his interest to . . . ROSCH, who thereby became an equal partner in the projects.
>
> #6. . . . on **May 12, 1981** (emphasis added), the Board of Directors approved a proposed loan in the amount of $840,000 for several portions of the Woodridge project in which defendant ROSCH had a 50% financial interest. Defendant . . . ROSCH concealed his interest from the Board, and the proposed loan was presented . . . in the name of the individual [Hargrove].

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[4] Rosch is not stranger to litigation with the Government and is well documented in the public record. See *FSLIC vs. Rosch*, 84 C 7682 (N.D. Ill., 1984 <Incorrectly noted as a 1983 case in Hargrove's Petition>) involving Rosch's **1984** (emphasis added) purchase of common stock of Glen Ellyn Savings; *FSLIC vs. Glen Ellyn Savings*, 84 C 7685 (N.D. Ill., 1984) involving violations of a consent cease and desist order (the violations occurring in **1983** [emphasis added]); *Glen Ellyn Savings vs. FSLIC*, 85 C 6707 (N.D. Ill, **1985**) involving the use of FSLIC appraisals made in 1985 (emphasis added) which the were considered to be "low ball" appraisals by the plaintiff; *Vann vs. Glen Ellyn Savings, et. al.*, (Middle District of Florida, 86-171-CIV-T-13-C), now on appeal to U.S. Court of Appeals, 11th Circuit) involves various transactions occurring in **1984** and **1985** (emphasis again added). Most importantly, none of the above litigation has anything to do with the issue of whether Hargrove had committed the tort of fraudulent misrepresentation.

> #7. . . . in **March, 1982** (emphasis added), over one hundred land contracts were sold to prospective purchasers, . . . defendant caused Glen Ellyn Savings to purchase the land contracts. Defendant . . . ROSCH concealed from the Board . . . that he held a 50% interest in those contract.

Hargrove, in his petition states that Count 29 of the indictment relates directly to material evidence excluded in the trial of this cause and further states that Rosch's testimony, as a result of the indictment, was false and was designed to conceal some diabolical plot from the Government.

First of all, Rosch denies any wrongdoing whatsoever and respectfully submits that what occurred subsequent to the March 1, 1981 purchase of Hargrove's interest is completely irrelevant to any issue in this law suit. Rosch further respectfully submits that Hargrove is using the matters *alleged*[5] in the indictment to again engage in "character assassination."

The grave-man of the indictment is that ROSCH concealed something from the Board of Directors on **May 12, 1981** (emphasis added) — or 72 days after he had acquired Hargrove's interest.

To dispel the idea of concealment, attached hereto as Appendix "A" you will find excerpts from the *Supervisory Report of Examination of Glen Ellyn Savings and Loan Association as of April 23, 1983.* This is a report prepared by examiners from the Federal Home Loan Bank Board and the Office of the Savings and Loan Commissioner of the State of Illinois. It is done in conjunction with the management of the Savings and Loan (ie., Rosch and the Board of Directors) and a copy of the report was sent to each member of the Board. Set forth below are "quotations" from that report which

---

[5] As will demonstrated later herein, the allegations made by the Government and adopted by Hargrove are just that — they are neither evidence (in this case) nor do they purport to prove anything other than the fact that the Government also employs lawyers.

should clearly dispel any belief in the correctness of the matters alleged in the indictment dealing with the subject, to-wit:

> "Mr. Rosch has previously disclosed to the directors and supervisors that he is an attorney for Mr. Gerald A. Heinz. He has also disclosed that he has had various personal business transaction with Mr. Heinz that sometimes involve projects being financed by the association. Mr. Rosch has repeatedly stated that his relationship with Mr. Heinz has had no adverse effect on the association.
>
> * * *
>
> a) **Old Business:**
>
> Mr. Rosch and Mr. Heinz continue to be listed together on signature cards for the following partnerships:
>
> H-R-G Partnership
> Deerpath Farm
> 535 Pennsylvania Partnership
> Piers II Development Company
> Oak Hill Developers
> Glenco Development Company
> R.H.H., Inc.
>
> * * *
>
> Mr. Rosch states that he is a partner in H-R-G to control Mr. Heinz's finances. The projects involve those he had purchased interests in from Jack Hargrove in 1980 (sic) and sold to Mr. Heinz in 1981 (sic). [N.B. Should be 1981 and 1982 respectively.]
>
> He is also a creditor of H-R-G in the approximate amount of $400,000. As shown in the May 26, 1982 Examination Report under "Waterbury", sale proceeds of $500,000 were used to open jumbo savings accounts at the association in the name of John Rosch, trustee for H-R-G.
>
> These accounts were later closed, but Mr. Rosch said that all but $100,000 went to pay various creditors of H-R-G or Mr. Heinz. Mr Rosch said the $100,000 was

used to pay his own income tax liability which arose from the previously mentioned sale to Mr. Heinz.

* * *

Regarding old business, Mr. Rosch said that he will stay involved with Mr. Heinz to ensure that the association's interests, as well as his own, are protected.

* * *

b) **Oak Hills, Woodridge, Illinois**

The association granted a $150,000 loan secure by ten acres of unimproved land zoned for 18 four-unit buildings and four six-unit buildings in 1977. In 1981, six lots were released then the association granted six $140,000 construction loans to build four until buildings. The borrower was Beverly Bank Trust No. 8-7010. The beneficiary of the trust was Jack Hargrove Builders, Inc., and the loan was guaranteed by Jack Hargrove. In a prior examination report Mr. Rosch informed the examiners that he purchased an interest in this property which was subsequently sold to Gerald Heinz. Mr. Rosch said that Jack Hargrove is no longer involved in the project, and it is being finished by Gerald Heinz, who is also making payments on the initial loans. Technically based on loan documents, Jack Hargrove remains the obligor since Gerald Heinz has not signed an assumption agreement with the association.

* * *

4. **Real Estate Owned Contracts.**

* * *

As readily seen, a significant concentration of these units is in one project, Waterbury. A total of 122 contracts were purchased in this complex in March, 1982. The seller was Glenco Development Company, Ltd., owned by Gerald Heinz. Mr Rosch has previously disclosed that he was once a part owner in this project. Private mortgage insurance covered 66 of the contracts. At our date, eight of the 19 "repossessed" units were

rented and there were sales prospects for several of the remaining units. . . ."

The aforesaid excerpts are set forth to dispel both the notion that the matters alleged in the indictment are factual and that the date(s) of the matters alleged in the indictment all occurred long after the transaction with Hargrove was concluded.

One of the reasons for the rather long inclusion of excerpts from one of the examination reports (prepared by the Government) is to make this Court aware that there are at least two sides to every story; that not everything the government says is correct (and is certainly not evidence in any legal sense); that nothing contained in the indictment has any relevance to the case presently before this Court; and that the tactics employed by the petitioner have not always been in keeping with the more noble goals of the legal profession.

A further example of scurrilous arguments can be found on page 13 of the petition. Hargrove states that after (emphasis added) March 1, 1981, Daniel Gilmartin signed waivers and received checks from Glen Ellyn. What has been cleverly omitted (perhaps deliberately) is that all of the loans taken out by Hargrove at Glen Ellyn were in his name and that they became the assets of the new partnership after March 1, 1981 (C-8158). Also, to facilitate the transition from the old partnership (ie., Hargrove-Heinz) to the new partnership (ie., Rosch-Heinz), Hargrove offered to execute and did sign a power of attorney which authorized Mr. Gilmartin to act for and on behalf of the Petitioner (Hargrove), (Har. Exh. 128-2, C-8305) so that Hargrove would not have to be bothered executing subsequent pay-outs.

REASONS FOR DENYING THE WRIT:

A. THERE IS A COMPLETE LACK OF A SUBSTANTIAL FEDERAL QUESTION.

Any factual basis upon which the Petitioner claims a "federal constitutional question" is non-existent, *supra*. This lack of facts can best be illustrated by noting that neither the opinion of the Illinois Appellate Court or the Illinois Supreme Court (128 Ill 2d 179, 538 N.E. 2d 530) mentions, discusses or passes upon any Federal Constitutional question.

Secondly, the Respondent has either predicated his argument upon incorrect (or deliberately inaccurate) facts or upon matters specifically excluded from evidence. *Supra*.

The decision below was rendered in absolute conformity with the power vested in the Illinois Supreme Court in the instant case. There is no legal or factual basis upon which the Petitioner can predicate a "federal constitutional question" (ie., a violation of due process or a violation of a constitutional right of access to the courts).

B. PETITIONER'S ALLEGED FEDERAL CLAIM WAS NOT PROPERLY PRESENTED TO THE STATE COURT.

Prior to the final judgment of the Supreme court of Illinois in this case, Petitioner did not raise any Federal Constitutional questions. The validity of the state law was never challenged. The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were raised in the state courts at the proper time. *Hulbert v. Chicago*, 26 S.Ct. 617, 20 U.S. 275, 50 L.Ed. 1026 (1906); *Brown v. Commonwealth of Mass.*, 12 S.Ct 757, 579, 144 U.S. 543, 580, 36 L.Ed. 546 (1892); *John v. Pauling*, 34 S.Ct. 178, 231 U.S. 583, 58 L.Ed. 381 (1914).

This Court has jurisdiction to review the final judgment of a state court "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981). Also, recent cases have held that this Court lacks jurisdiction unless "[a]t the minimum . . . there [is] no doubt from the record that a claim under a federal statute or the Federal constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 100 L.Ed 2d 62 (1988) quoting *Webb v. Webb, supra*, 451 U.S. at 501.

The record in this instant case substantiates respondent's contention that the petitioner has failed to raise or preserve a valid claim either expressly or by clear implication sufficient to comport with the statutory requirements.

Further, the law of Illinois requires that constitution questions be raised in the trial court and, if not, they will not be considered on appeal. *In re: Magill's Estate*, 327 Ill.App.212, 63 N.E.2d 634; *Board of Education of Arbor Park School District No. 145 Cook County v. Ballweber*, 96 Ill.2d 520, 451, N.E.2d 858. Respondent submits that Federal constitutional questions may not be presented to this Honorable Court unless the precise questions have been placed in issue before the state courts. This basic procedural requirement is completely absent in this case. Also, the raising of a federal question for the first time in a Motion for Reconsideration is not timely for purposes of establishing jurisdiction for an appeal. *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935).

C. LACK OF ANY RULE 17 CONSIDERATIONS

The petition is also devoid of any of the considerations usually governing the granting of a review of certiorari as set

forth in Rule 17 of the *Rules of the Supreme Court of the United States*. No conflict of the ruling of the Illinois Supreme Court with any other court is articulated. No important question of federal law which needs resolution by this Court is argued. To the contrary, the Illinois court(s) ruled on a particular set of facts under a long standing precedent.

At best, Petitioner is arguing that this Court should now review the Illinois decision (on Constitutional grounds) because he feels that he has somehow been wronged.

D. PETITIONERS' ARGUMENTS THEMSELVES ARE NOT WELL FOUNDED IN EITHER THE FACTS OF THE CASE OR THE APPLICABLE LAW.

The petitioners' argument is that they should have been allowed to present evidence on matters which occurred subsequent (and in most cases more that a year later) to the consummation of the purchase and sale of Hargrove's interest in the partnership. Evidence that a defrauded party (ie., Rosch) subsequently resold the property at a profit or that he received his money's worth, is inadmissible on the question of damages under Illinois law because the defrauded party is entitled to the benefit-of-his-bargain. *Hilton v. Ring*, 1903, 111 Ill. App 369; *Antle v. Sexton*, 1889, 32 Ill. App. 437, aff. 137 Ill. 410, 27 N.E. 691. Exclusion of evidence by the trial court will be presumed correct by the reviewing court in the absence of a showing to the contrary. *Duggan v. Ryan*, 211 Ill 133, 21 N.E. 807 (1904) and the Court may, in its discretion, refuse any evidence not calculated to prove issues and may regulate the manner of the proceedings to promote an orderly investigation of matters in controversy. *Chgo. & A.R. Co. v. Smith*, 10 Ill. App. 359; *Hagerman v. Nat'l Food Stores, Inc.*, 5 Ill. App. 3d 439, 283 N.E. 2d 321.

Also, under Illinois law, an appellant (Hargrove) cannot, on appeal, adopt a different theory with respect to matters of evidence from that assumed in the trial court. *Handley v.*

Erb, 314 Ill. App. 207, 41 N.E. 2d 222 (1942); however, as indicated by the record, the appellants' theory as to the "appropriate time frame" varied depending upon what was most expedient at that particular time. The Illinois Appellate Court summed the matter up rather nicely (Petitioners' Appendix, at C7 and C8):

> "Hargrove challenges numerous evidentiary rulings . . . which he asserts resulted in the exclusion of relevant evidence. A trial court's determination of whether evidence is relevant is largely within its discretion, and its ruling should not be reversed absent a clear abuse of discretion (*Benson v. Bradford Mutual Fire Insurance Corp.* (1984), 121 Ill. App. 3d 500, 459 N.E. 2d 689, *appeal denied*; *Kyowski v. Burns* (1979), 70 Ill. App. 3d 1009, 1018, 388 N.E. 2d 770, . . .) We find no abuse of discretion in the exclusion of evidence based on relevancy grounds, nor do we find error in the court's exclusion of documentary evidence offered by Hargrove on the ground that they were untimely, illegible, or incomplete. * * *"

In the Appellate Court, Hargrove argued that Judge Kinney erroneously excluded "relevant and probative evidence." (See: Brief of Appellant, Appellate Court, pp 8-9). This argument was disposed of by the Appellate Court, *supra*. Subsequently, the appellant's brief (ie., Hargrove) filed with the Illinois Supreme Court did not contain any further claim of error relative to evidentiary matters. Under Illinois law, an (appellate) Court on review can only consider evidence admitted by the trial court and cannot consider evidence not admitted; *In re: Magill's Estate*, 327 Ill.App. 212, 63 N.E. 2d 634 and issues not argued in the appellants' brief are deemed waived. *Board of Education of Arbor Park School District . . . v. Ballweber*, 96 Ill. 2d 520, 451 N.E. 2d 858, 71 Ill.Dec. 704. To further illustrate the complete absence of any argument made in the Supreme Court of Illinois relating to any questions dealing with the exclusion of *irrelevant evidence* offered by Hargrove, this Court's attention is directed

to Justice Clark's opinion in the Illinois Supreme Court (Petitioners' Appendix A), and in particular at page A-10-11 (listing the five (5) claims of error in Hargrove's Appeal No. 67035). Conspicuously absent from any claim of "error" is the exclusion of evidence that the trial court deemed "irrelevant."

The petitioners' second argument is that "[t]he Illinois courts' erroneous interpretation of the benefit-of-the-bargain rule unconstitutionally denied Hargrove of property without due process."

This statement is a *non sequitur*, is illogical on its face and displays a complete lack of understanding of the benefit-of-the-bargain rule as enunciated by Illinois Supreme Court and is absolutely contrary to the evidence in this case.

The general rule prevailing in most jurisdictions is that a person acquiring property by virtue of a commercial transaction who has been defrauded may recover as compensatory damages in a tort action the difference between the value of the property at the time of the making of the contract and the value that it would have possessed if the representations had been true. *Gerill Corp. v. J. L. Hargrove Builders* (supra), [See Petitioners' Appendix A-14], 37 *Am. Jur 2d* (Fraud and Deceit) #353.[6]

Hargrove's claim that the evidence does not support the award of damages ignores the evidence received at the trial (and as outlined and set forth in Petitioners' Appendix as

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[6] There are only two (2) rules or formulas on the question of the proper measure of damages recoverable in an action for fraud and deceit. These rules are known as the "benefit-of-the-bargain" rule and the "out of pocket" rule. (or a combination thereof known as the "formula" rule). Assuming, *arguendo*, that Hargrove is correct in his argument (ie., that the benefit-of-the-bargain rule is not the proper measure of damages), then under the "out of pocket" rule (which Illinois does not follow), the Respondent would be entitle to recover his entire investment in the partnership, ie., $200,000.00 (which is more than the damages awarded in these proceedings).

Exhibit D [and in particular D-6]). In the petition herein, Hargrove argues that "Illinois Courts ... are supposed to require every plaintiff to show his damages with a 'fair degree of probability'." and cite the case of *Nisbet v. Yelnick*, 124 Ill. App. 3d 466, 474 N.E. 2d 781 (1984). *See* Petition, page 25. The *Nesbet* case involved an action for breach of warranty (ie., cracks in the foundation of a new home) and had nothing to do with an action in tort (for fraud). Even though the case is not on point, the *obiter dicta* in the case may be germane here:

> "Absolute certainty concerning the amount of damages is not required to justify recovery where existence of the damages is established. The evidence need only tend to show a basis for computation of damages with a fair degree of probability. * * *"

On the same page of their petition, Hargrove also cites the case of *Leon v. Thorlief Larsen and Sons, Inc.*, 133 Ill. App. 2d 911, 913, 272 N.E. 2d 799 (1977). This case involved a union bricklayer that sued his former employer for breach of contract of employment and held that a defendant's failure to explicitly deny allegations of damages in a complaint was not an admission thereof.

Alluding again to the opinion of Justice Clark (at page A-14 and 15 of petitioners' appendix) the correct and applicable proposition of law can be stated as follows:

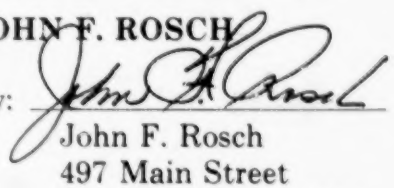
> "The proper measure of damages under the benefit-of-the bargain rule, then, and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Hargrove and what those liabilities actually were. How Rosch or the joint venture subsequently dealt with those liabilities was irrelevant to this determination. Our review of the record also convinces us that the results arrived at by the circuit court in applying the benefit-of-the-bargain rule were amply supported by the evidence.

CONCLUSION

For all of the foregoing reasons, this respondent urges this Court to dismiss Petitioner's Petition for want of jurisdiction or, alternatively, to deny the petition.

Respectfully submitted,

JOHN F. ROSCH

By: 

John F. Rosch
497 Main Street
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(312) 858-5486

and

John T. McGarry
John T. McGarry, Ltd.
1609 E. 53rd Street
Chicago, IL 606015
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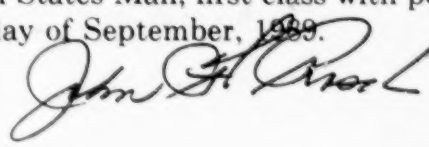
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari was duly served on Michael H. King, P.C. and Alexander R. Domanskis at 150 North Michigan Avenue, Suite 2500, Chicago, Illinois 60601 by United States Mail, first class with postage prepaid, on this 18 day of September, 1989.



APPENDIX

A1

STATE OF ILLINOIS

OFFICE OF THE
SAVINGS AND LOAN COMMISSIONER

SUPERVISORY

REPORT OF EXAMINATION

of

GLEN ELLYN SAVINGS AND LOAN ASSOCIATION
444 MAIN STREET
GLEN ELLYN, ILLINOIS 60137

THIS REPORT OF EXAMINATION IS STRICTLY CONFIDENTIAL

This report is for supervisory purposes only. A copy is furnished the directors and officers of the subject association for their confidential information. Under no circumstances shall the association's directors, officers or employees disclose or make public in any manner all or part of this report.

AS OF CLOSE OF BUSINESS

APRIL 23, 1983

This report contains 22 consecutively numbered pages.

June 9, 1983

FHLBB Docket No. 6110

Commissioner of Savings and Loan Associations, State of Illinois
Springfield, Illinois

and

Supervisory Agent, Federal Home Loan Bank Board
Chicago, Illinois

We have made a supervisory joint examination of GLEN ELLYN SAVINGS AND LOAN ASSOCIATION of Glen Ellyn, Illinois as of April 23, 1983 and submit herewith a report of our findings. Comments and conclusions are based on analyses of information obtained from the institution's records and from other authoritative sources.

/s/ DONALD J. KEANE
State Examiner

/s/ DONALD H. SORENSEN
Federal Home Loan Bank Board Examiner

REPORT INDEX

2. Interests of John F. Rosch

In addition to his duties as Managing Officer, Mr. Rosch is also active as an attorney doing business as the Law Office of John Franklin Rosch, Ltd. This firm occupies some space rent free in the association's office building as partial consideration for the preparation of tract searches and the issuance of title policies. From August 28, 1982, to April 1, 1983, Mr. Rosch stated that this firm received $26,573 in legal fees from the association. Michael Pietrzak, a multiple borrower of the association who Mr. Rosch states is an "independent contractor," is working on several items of litigation mentioned in Mr. Rosch's attorney letter.

Mr. Rosch previously disclosed to the directors and supervision that he is an attorney for Gerald A. Heinz, who is the association's largest multiple borrower. He has also disclosed that he has had various personal business transactions with Mr. Heinz that sometimes involved projects being financed by the association. Mr. Rosch has repeatedly stated that his relationship with Mr. Heinz has had no adverse effect on the association.

In the board of directors' December 10, 1982 response to supervision, Mr. Rosch "agreed to sever any and all relationships with Mr. Heinz so that the potential for a possible conflict of fiduciary duties cannot hereafter arise." The letter further states that "any subsequent dealings with Mr. Heinz will be done only by the board of directors with Mr. Rosch abstaining from any vote. In addition thereto, Mr. Rosch, in his capacity as a private attorney, has agreed not to have his office represent Mr. Heinz in future matters and has further agreed that upon the conclusion of presently pending matters, his office will not perform any legal services for Mr. Heinz that are related to any matters which might, directly or indirectly, involve the Savings and Loan."

a) **Old Business**

Mr. Rosch and Mr. Heinz continue to be listed together on signature cards for the following partnerships:

H-R-G Partnership
Deerpath Farm
535 Pennsylvania Partnership
Piers II Development Company
Oak Hill Developers
Glenco Development Company
R.H.H., Inc.

With the exception of H-R-G, Deerpath, and 535 Pennsylvania discussed later, Mr. Rosch has sold his interest to Mr. Heinz, but remains on the signature cards to control the repayment of association loans and other funds he is owed personally by Mr. Heinz.

1) **H-R-G (Woodridge)**

Mr. Rosch states that he is a partner in H-R-G to control Mr. Heinz's finances. The projects involve those he had purchased interests in from Jack Hargrove in 1980 and sold to Mr. Heinz in 1981.

He is also a creditor of H-R-G in the approximate amount of $400,000. As shown in the May 26, 1982 Examination Report under "Waterbury", sale proceeds of $500,000 were used to open jumbo savings accounts at the association in the name of John Rosch, trustee for H-R-G.

These accounts were later closed, but Mr. Rosch said that all but $100,000 went to pay various creditors of H-R-G or Mr. Heinz. Mr. Rosch said the $100,000 was used to pay his own income tax liability which arose from the previously mentioned sale to Mr. Heinz.

2) **Deerpath Farms (Batavia)**

Mr. Rosch said he has an interest in four of seven parcels in this project. The association has previously granted loans on the security of the other three parcels to Kenneth Heinz, son of Gerald Heinz. Mr. Rosch said that he will sell his interest to Kenneth Heinz when the property warrants development, quite probably this year.

3) **535 Pennsylvania Partnership**

Mr Rosch states that this partnership is his personal business because it has no connection with the association.

b) **New Business**

Mr. Rosch abstained from voting upon the November 1982 purchase of controls from Mr. Heinz, and although the minutes were not yet available, he stated he also abstained from voting on the May 1983 purchase of contracts from Mr. Heinz and will abstain from voting on the latest purchase from Messrs. Heinz and Breault.

b) **Oak Hills, Woodridge, Illinois**

The association granted a $150,000 loan secured by ten acres of unimproved land zoned for 18 four-unit condominium buildings and four six-unit buildings in 1977. In 1981, six lots were released when the association granted six $140,000 construction loans to build four unit buildings. The borrower was Beverly Bank Trust No. 8-7010. The beneficiary of the trust was Jack Hargrove Builders, Inc. and the loan was guaranteed by Jack Hargrove. In a prior examination report Mr. Rosch informed the examiners that he purchased an interest in this property which was subsequently sold to Gerald Heinz. Mr. Rosch said that Jack Hargrove is no longer involved in the project, and it is

being finished by Gerald Heinz, who is also making payments on the initial loans. Technically based on loan documents, Jack Hargrove remains the obligor since Gerald Heinz has not signed an assumption agreement with the association.

As of March 31, 1983, the loans have a net balance of $731,129. At this date, all of the loans are delinquent ranging between three and eleven months. In addition, there have been no condominium sales closed. Appraisals by Richard Brooker, C.A.S. indicate a value of $1,412,000 on a "retail" basis only therefore do not conform to Memorandum R 41a. Construction activity has increased during the Spring of 1983 and by May 1983, all of the units are nearing completion.

President Rosch said that 22 of the units have been sold but closing is a slow process because all of the sales are FHA or VA. He added that four additional four unit construction loans of $140,000 were granted during March 1983. The beneficiary of the trust holding title to these four properties was Gerald Heinz. He said based upon an oral agreement with Mr. Heinz, there will be no loan disbursements until the existing condominium units are sold and the loans repaid.

4. **Real Estate Owned Contracts**

Prior examination reports have detailed the association's purchases of contracts from various builders. Most of the contracts are converting into adjustable rate mortgages at maturity. As delinquencies arise, or the contract purchasers become unwilling or unable to continue payments, the association is "foreclosing" or at least perfecting title, and taking possession to many of these units. Perfecting title generally entails getting a quit claim deed or a mutual release form signed by the contract purchaser. If the units are abandoned, the association has to file a "declaration of forfeiture" and get a court order to clear title.

At March 31, 1983 "scheduled contracts" because of delinquencies are minimal, but the association has an inventory of 29 foreclosed units as follows:

Project	No.	Balance
Waterbury	19	$ 715,426
Willow Shores	4	164,298
Willow of Fox Valley	3	126,627
Piers II	1	55,114
Timber Ridge	1	52,015
Briar Hill	1	47,051
Total	29	$1,160,531

As readily seen, a significant concentration of these units is in one project, Waterbury. A total of 122 contracts were purchased in this complex in March 1982. The seller was Glenco Development Company, Ltd., owned by Gerald Heinz. Mr. Rosch has previously disclosed that he was once a part owner in this project. Private mortgage insurance covered 66 of the contracts. At our date, eight of the 19 "repossessed" units were rented and there were sale prospects for several of the remaining units. The association is offering a "rental with option to buy" alternative in addition to outright sales of the units.

Private mortgage insurance claims are placed in a reserve account which is used to pay taxes and assessments until sale, at which time the claim is netted against the book balance for profit determinations. At March 31, 1983, the reserve account totaled $112,358 for 13 units and there were additional claims pending of approximately $90,000 for nine additional units. With four exceptions, these claims all relate to Waterbury units. Based upon master appraisals in the project and appraisals supporting new loans being granted, there are no indicated losses at this time.

Mr. Rosch stated that management was aware that there would be some problem borrowers in the Waterbury project, but stated that the private mortgage insurance and large amount of discount income easily justified the association's involvement. He believes the worst is certainly over and expects the remaining contract purchasers to live up to their obligations.

Board of Directors
Glen Ellyn Savings and Loan
Association
444 Main Street
Glen Ellyn, Illinois 60137

Gentlemen:

Transmitted herewith is a copy of the report of examination of the association as of the close of business, April 22, 1983, made by examiners representing the Commissioner of Savings and Loan Associations and the Federal Home Loan Bank Board.

The examiners' report results from their analysis of the association's activity since the preceding examination. Due to the scope limitation this examination should not be considered an audit.

The examiner's report may include matters not specifically referred to hereafter in this letter. In my judgement these matters are either not serious enough to request corrective action at this time, or, the corrective action taken or assured by management is satisfactory. They do, however, deserve your careful consideration.

A review of the examination report indicates that your careful attention should be directed to the following matters:

ITEM I-C - SCHEDULED ITEMS

Scheduled items increased over 30% during the review period and totaled $9,444,984 or 11.3% of assets at the date of the examination. A majority of the scheduled items from the previous report of examination are repeated and many of the new scheduled items consist of forfeited real estate contracts. These real estate contracts were a subject of comment in the prior report.

Over 70% of the scheduled items are concentrated with a relatively few borrowers and consist of land development projects as shown at page 6 of the report of examination. Also, you should advise us of your plans for the acreage in Fox River Grove.

The minutes of your next regular meeting should record your consideration of the entire report and the corrective action taken to matters set forth above. Immediately thereafter, your detailed reply stating the corrective action taken, should be forwarded to this office in quadruplicate. The reply *should be signed by each director* and forwarded *within thirty-five days.*

Pursuant to Section 7-2 (c) of the Illinois Savings and Loan Act, each director should execute a signed affidavit acknowledging that he has read the report of examination. This affidavit should be filed and preserved by the association.

Should the Federal Home Loan Bank Board have any comments relative to this examination, they will be forwarded to you by this office at a later date.

Very truly yours,

/s/ J.R. CROWN

J.R. CROWN
Chief Examiner

JRC/JLT/lvn

cc: Supervisory Agent
OES, FHLBB

No. 89-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Petitioners,

v.

JOHN F. ROSCH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONERS

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Petitioners,

v.

JOHN F. ROSCH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONERS

In reply to the Brief in Opposition to the Petition for Writ of Certiorari, Petitioners, Jack L. Hargrove Builders, Inc. and Jack L. Hargrove ("Hargrove") state as follows:

INTRODUCTION

From the inception of this lawsuit, Hargrove has attempted to demonstrate, to no avail, that relevant and probative evidence in this case was systematically excluded by the Illinois courts, regarding the inherent

nature of Rosch's transaction with Hargrove; the utter immateriality of the list Rosch reviewed prior to his transaction with Hargrove; and the total absence of damage to Rosch as a result of the transaction. Hargrove attempted to demonstrate, to no avail, that evidence relating to events both before and after the parties' transaction on March 1, 1981 was essential to its case. Unfortunately and inexplicably, Illinois' courts refused to give Hargrove the opportunity to introduce evidence of events dated after March 1, even though this opportunity was granted to Rosch to support his case on damages.

Contrary to Rosch's claims, Brief in Opposition at 5, Hargrove's position at this stage is not "totally inconsistent with the position adopted by [its] counsel" at trial. At trial, Hargrove sought consistency and fairness in the trial court's rulings—nothing more. On appeal, Hargrove sought to have the Illinois Appellate Court and Illinois Supreme Court avoid excessive deference to the talisman of "manifest weight of the evidence," but instead apply a reasoned review of the facts and merits of Hargrove's case. Nothing more. To date, Hargrove's efforts have been fruitless.

Hargrove has not "attacked" anyone disagreeing with its theory of the case, despite what Rosch may think. Hargrove's counsel has fought to win justice for an innocent defendant and deny a windfall profit to a wholly undeserving plaintiff. Nothing more.

REPLY OF THE PETITIONERS

I.

EVIDENCE OF ROSCH'S INDICTMENT IS DIRECTLY RELEVANT TO THIS CASE.

It is hardly "character assassination," as Rosch suggests, to inform this Court of the existence of Rosch's recent indictment, on issues central to this case. Brief in Opposition at 7. Rosch claims that Counts 1 through 28 of his indictment have "nothing whatsoever to do" with any matter before this Court, because they concern Glen Ellyn loans made after Rosch's March 1, 1981 transaction with Hargrove, *id.* at 6. In fact, Hargrove's petition addresses itself to only one of the counts of the indictment, Count 29, which unquestionably concerns Rosch's transaction with Hargrove and has everything to do with the matter before this Court. The allegations in Count 29 concern Rosch's concealment of his interest in the Oak Hills portion of Woodridge; Rosch won nearly half of his fraud judgment by contending that Hargrove failed to disclose debts for Oak Hills. Hargrove adds, however, that the full 29 count indictment of Rosch and others is highly material to the issue of Rosch's motivations for his deal with Hargrove—to the question of whether Rosch would have transacted with Hargrove, but for Hargrove's alleged misrepresentations.

1. The Supervisory Report Provided by Rosch Provides Further Evidence of Rosch's Perjured Trial Testimony.

The question of Rosch's truthfulness at trial—especially, Rosch's statements that he advised the Glen Ellyn Board of Directors of his interest in Woodridge and abstained from voting on the board's decision to fund Woodridge at the time Rosch was a 50 percent owner, C-8158; 9428-

29—is essential to this case. If Rosch gave false testimony, and if in fact he defrauded his own savings and loan by concealing his interest in Woodridge, as the federal criminal indictment against him alleges, then Rosch's credibility is without weight and the judgment against Hargrove is a miscarriage of justice. Ironically, the Supervisory Report appended to Rosch's Brief in Opposition sheds further light on this question and reinforces *Hargrove's*, not Rosch's, theory of the case.

The Supervisory Report of Examinations regarding Rosch's disclosures to his Board of Directors at Glen Ellyn Savings and Loan, prepared by the Illinois Commissioner of Savings and Loan Associations and the Federal Home Loan Bank Board—identified herein as "Rosch App."—is as telling for what it does *not* say about Rosch's disclosures to the Glen Ellyn Board as it is for what it does say. The report, dated April, 1983, states that Rosch previously revealed to the Glen Ellyn Board his business relationship with Heinz, Glen Ellyn's "largest multiple borrower." The report does *not* state whether this disclosure occurred before the Rosch-Hargrove transaction. Rosch App. at A4. The report states that Rosch previously disclosed that he had various personal business transactions with Mr. Heinz, sometimes concerning projects financed by Glen Ellyn. *Id.* The report does not state whether the Glen Ellyn Board knew in March, 1981 of Rosch's role as the co-developer of Woodridge, with Heinz.

Finally, according to the report, in December, 1982 Rosch "agreed to sever any and all relationships with Mr. Heinz" to avoid the potential for conflict, and further agreed that "any *subsequent* dealings with Mr. Heinz will be done only by the board of directors with Mr. Rosch abstaining from any vote." Rosch App. at A4 (emphasis added). If Rosch agreed to abstain from voting on future projects involving Heinz only in December, 1982, it is

probable that Rosch did *not* abstain from voting on the Board's loans to Woodridge, which Hargrove applied for in the fall of 1980 but which were only funded after Rosch acquired Hargrove's interest. Such evidence, if true, directly contradicts Rosch's testimony at trial. C-8158; 9428-29.

The Supervisory Report, like Rosch's indictment itself, offers support for Hargrove's theory of defense in this matter, and also lends support to Hargrove's claim that unconstitutional rulings made against Hargrove deprived Hargrove of any meaningful chance to make its case.

II.

THIS COURT CLEARLY HAS JURISDICTION OVER THE INSTANT PETITION.

Rosch's contention that this Court lacks jurisdiction over this Petition is wrong: during the course of trial and in subsequent appeals, Hargrove repeatedly raised timely objections to each of the evidentiary rulings at issue. The fact that Hargrove did not initially identify the trial court's errors as constitutional violations is of no moment.

1. Hargrove Raised The Erroneous Evidentiary Rulings At Trial.

For a reviewing court to determine whether a trial court committed reversible error, it is only necessary for specific acts or omissions constituting error to be properly suggested as error to the trial court and presented for review. *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 (3d Cir. 1982). A party must adequately inform the trial and appellate courts that error has occurred, so that the court can consider its rulings and correct them. *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976). There is no requirement that a constitutional theory be adopted and asserted from day one, however. "Arguments made

on appeal need not be identical to those made below . . . if the elements of the claim were set forth and additional findings of fact are not required." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 525 (2d Cir. 1982). Hargrove presented the elements of its claim throughout trial and on appeal to no avail, both as to the exclusion of evidence on Hargrove's theory of defense and as to the court's erroneous evidentiary rulings on damages. C-8392-93; 9326; 9359-76; 9428-40.

2. Hargrove Raised Specific Constitutional Objections With The Illinois Supreme Court.

Even if it is assumed, *arguendo*, that Hargrove did not adequately present constitutional objections to evidentiary rulings at trial, there is no doubt that Hargrove properly raised its objections, as constitutional objections, at the time it filed its petition for rehearing.

On appeal, a party may not preserve a constitutional challenge merely by making generic references to the Constitution. *Taylor v. Illinois*, 484 U.S. 400, ____ n. 9, 108 S.Ct. 646, 651 n. 9 (1987). An objection *is* properly preserved, however, if a state court has been properly apprised of the nature of the constitutional objection. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

As even Rosch concedes, Hargrove made specific and direct objections on Fourteenth Amendment, due process, grounds in its petition for rehearing before the Illinois Supreme Court. In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988)—a case relied on by Rosch himself—this Court recognized that such specific constitutional challenges *will* properly preserve the constitutional issues for appeal. *Crenshaw*, 108 S.Ct. at 1650.

At trial and on appeal, Hargrove properly raised objections relating to the trial court's erroneous and un-

constitutional evidentiary rulings, giving this Court jurisdiction over this Petition.[1]

3. The Interests Of Justice Require That This Court Exercise Jurisdiction Over The Instant Petition.

Even assuming, *arguendo*, that Hargrove's assertion of a due process violation by the Illinois Courts was otherwise waived, in light of the recent indictment of Rosch on matters central to Hargrove's appeal, it is essential that this Court grant certiorari to prevent a miscarriage of justice.

It is well-established that a litigant's failure to make timely objections to error will not constitute a waiver of those objections, if the error is so fundamental as to result in a miscarriage of justice. *Lee v. Dallas County Board of Education*, 578 F.2d 1177 (5th Cir. 1978). In *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), this Court recognized that "no general rule" limits a reviewing court's power to determine new issues "where injustice might otherwise result." Particularly where due process considerations are implicated, as here, a litigant is entitled to have his appeal considered regardless of the preservation

[1] Hargrove notes, additionally, that the constitutional violations involved here occurred only with the trial court's judgment and thereafter. Hargrove could not have anticipated and could not raise objections to these rulings in the course of trial. Hargrove did assert the violation of its constitutional rights as soon as its claim fully ripened, i.e., as soon as the Illinois Supreme Court affirmed the lower court's unconstitutional rulings and then found, contrary to precedent, that "[h]ow Rosch . . . subsequently dealt with [Woodridge] liabilities was irrelevant" to the determination of damages. Opinion at 11. When a federal issue arises from an unanticipated ruling of the state court, and a petition for rehearing presents the first opportunity to raise a constitutional objection, the issue is not waived. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Estate of Wilson v. Aiken Industries*, 439 U.S. 877, 879 (Blackmun, J., concurring).

of the issue below. *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970); *Taylor v. National Trailer Company, Inc.*, 433 F.2d 569 (10th Cir. 1970). The interest in reviewing new issues where justice requires has been reaffirmed by this Court in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

In *United States v. Krynicki*, 689 F.2d 289 (1st Cir. 1982), the First Circuit listed four factors to be weighed in deciding whether to hear a new issue on appeal: (1) whether the new issue is purely legal; (2) whether the argument of the party raising the issue is highly persuasive; (3) whether the issue would likely arise in other cases, if not heard now; and, most importantly, (4) whether refusing to decide the argument would result in a miscarriage of justice. *Krynicki*, 689 F.2d at 292.

Hargrove's claims satisfy each of these criteria. First, the violation of Hargrove's constitutional rights can be determined without additional facts beyond the trial record. Deciding whether Hargrove received due process requires only that the Court apply the standards for due process to the events that occurred at trial. Second, Hargrove's argument is persuasive. A plaintiff must prove injury to be entitled to damages, and Rosch proved no injury at all here. *Kinsey v. Scott*, 124 Ill.App.3d 329, 463 N.E.2d 1359 (2d Dist. 1984); *Ustrak v. Fairman*, 781 F.2d 573 (7th Cir. 1986), *cert. denied*, 479 U.S. 824 (1986). In addition, Rosch's indictment provides clarity and support for Hargrove's theory of defense that Rosch arranged his transaction with Hargrove to defraud his own savings and loan, and that Rosch himself was not defrauded. Third, this issue is likely to recur: a holding by the Illinois courts that Rosch is entitled to damages, without any showing of loss, will invite a limitless number of uninjured plaintiffs to seek a windfall in the courts.

Finally, in light of the recent indictment of Rosch, on matters central to this Petition, this Court's consideration of this issue is necessary to prevent a miscarriage of justice to occur. Damages are a means by which an injured party can be made whole, and individuals who have lost nothing are entitled to be given nothing. There is now compelling evidence that Rosch was neither injured nor defrauded in his transaction with Hargrove. Particularly in light of Rosch's indictment, it is clear that the Illinois courts' rulings in this matter threaten to transfer money from an innocent defendant to an undeserving plaintiff. A granting of a writ of certiorari is necessary to prevent this miscarriage of justice.

CONCLUSION

For the foregoing reasons, Petitioners Jack L. Hargrove and Jack L. Hargrove Builders, Inc. pray that a Writ of Certiorari issue to review the decision of the Illinois Supreme Court and, upon review, to reverse that Court's decision in this case.

Respectfully submitted,

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